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ABSTRACT

Presented are three congressional hearings on a joint resolution proposing an amendment to the Constitution of the United States relative to equal rights for women and men. The hearings focus on the impact of the Equal Rights Amendment (ERA) on domestic relations or family law; exceptions to the rule of equality contained in the ERA, in particular the "right to privacy" and the "unique physical characteristics" exceptions; and state experiences with state equal rights amendments. Testimony includes statements, prepared statements, and miscellaneous material (newsletters, letters, reports, etc.) from U.S. Senators and individuals representing Brigham Young University; National Organization for Women Legal Defense and Education Fund; Carleton College, Minnesota; Washington University, Missouri; University of Texas; and Harvard University. Over 600 pages of appendixes contain additional testimony, correspondence, reports, legal analysis, and miscellaneous materials. (YLB)

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S. Hrg. 98-1259, Pt. 2

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S.J. Res. 10

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO EQUAL RIGHTS FOR WOMEN AND MEN

JUNE 22, AUGUST 7, AND SEPTEMBER 19, 1984

PART 2

Serial No. J-98-42

Printed for the use of the Committee on the Judiciary

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THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: FAMILY LAW

FRIDAY, JUNE 22, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator DeConcini.

Staff present: Richard Bowman, full committee, Stephen J. Markman, chief counsel and staff director; Carol Epps, chief clerk; and Leslie Leap, clerk, Subcommittee on the Constitution.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. The subcommittee will be in order.

Ladies and gentlemen, this marks the ninth day of hearings by the Subcommittee on the Constitution on the proposed equal rights amendment to the Constitution. Although the present amendment has already been rejected during this Congress by the House of Representatives, we continue to hold these hearings on a periodic basis in order to establish the most thorough legislative history possible on the meaning of the ERA.

Should Congress, at some subsequent point, choose to repropose the ERA, I believe that the present series of hearings will enable Members of Congress as well as members of State legislatures to cast their votes on this measure in a more informed manner.

The focus of this morning's hearing will be on the potential impact of the equal rights amendment upon domestic relations or family law. I believe that it is fair to say that a substantial part of the controversy surrounding the ERA over the past decade has related to the effects of the amendment on this area of law.

As with our earlier hearings on the ERA, it is not principally our purpose to debate the substantive merits of the expected changes in public policy—whether such changes are desirable or undesirable—but rather to determine precisely what changes will be required by law should the ERA be ratified.

Whether or not such changes reflect improvements in public policy will, of course, have to be decided by Members of Congress and the State legislators.

In order to explore today's subject, we have two outstanding witnesses before us. They are Prof. Lynn Wardle and Ms. Marsha Levick.

Professor Wardle teaches at the school of law at the Brigham Young University in Utah and is a nationally recognized authority on family law, having written several books on related topics.

Ms. Levick is the legal director of the NOW Legal Defense and Education Fund. Ms. Levick, no doubt, will have a direct impact on what the ERA means should it become part of the Constitution.

So I welcome both of our witnesses to the committee this morning. We look forward to hearing their views on this particular issue.

Several members of the committee have expressed concern about the fact that we have held so many hearings. This is the ninth in a series of hearings. I believe that all of the hearings have been very beneficial in understanding just where the ERA may be taking us should it become part of the Constitution.

We have tried to be balanced in these hearings, and of course, we have tried to make sure that both sides are equally represented. I have been somewhat disappointed from time to time because, although we have invited both sides to participate, we have not always been given the names of the witnesses for the proponents in a timely manner. From here on in, if the proponents genuinely want to participate in these hearings, they need to cooperate a little more with the committee and let us know who their witness will be in a more timely fashion. I would appreciate their help in making these hearings an effective means of defining and addressing the issues and problems associated with the ERA.

Let me call both witnesses to the table. Professor Wardle and Ms. Levick, we are very happy to have you here today.

We will start with Professor Wardle first and then we will turn to Ms. Levick.

STATEMENTS OF A PANEL CONSISTING OF LYNN D. WARDLE, PROFESSOR OF LAW, J. REUBEN CLARK LAW SCHOOL, BRIGHAM YOUNG UNIVERSITY, PROVO, UT, AND MARSHA LEVICK, LEGAL DIRECTOR, NOW LEGAL DEFENSE AND EDUCATION FUND

Professor **Wardle**. Thank you, Mr. Chairman.

It is a great honor for me to appear in these hearings today and I commend the subcommittee and the Senate as a whole for its attention to this issue. This is a matter of great concern, the impact of the ERA on family law.

In fact, one study that I read before coming out here revealed that homemakers or housewives who have no independent source of income, that is, who are not members of the paid work force, constitute one of the most potent groups of opponents to the equal rights amendment.

The reason that so many homemakers and women who pursue traditional careers as mothers and wives are opposed to the equal rights amendment is because of their concern over this very issue, the potential impact of the ERA on family laws.

So I commend the Members of the Senate for devoting their attention to this subject.

I want to begin by emphasizing that no one knows for sure, and certainly I do not know for sure, what impact the ERA would have upon laws in general or upon family laws in particular. The reasons for this are manifold.

One of the reasons is because the proposed ERA, of course, is not even out of committee yet, has not been debated on the floor of the Senate, and another reason is because the standard of judicial review under the equal rights amendment is not certain.

We do know that it would require a much more strict standard of judicial scrutiny, of laws which treat men and women differently, but we do not know just how much more strict than present 14th amendment scrutiny would be required.

Some proponents of the ERA, in fact, many proponents and even some opponents, appear to believe that the standard of review would be a near-absolute standard, that is, prohibiting all legal discrimination in any respect, with two qualifications, one for the right of privacy, essentially men and women do not have to sleep in the same dormitory rooms and things like that. The other is the exception for unique physical characteristics, that is, physical, physiological, biological characteristics, and that's a very narrow exception.

Many people believe that there are other differences between men and women than just physical differences, that there are emotional differences and psychological differences, differences in the way that they nurture and relate to children, and that those differences ought to be taken into account or at least States ought to be allowed to take those differences into account in establishing family law.

So I want to emphasize at the outset that I am using somewhat of a crystal ball here and no one knows for sure now today what impact the ERA would have, but I will assume and I think everyone agrees that it would require a stricter standard of scrutiny than is presently applied.

With that in mind, I believe that there are four general consequences that would flow from the adoption of the ERA, and I will describe them briefly.

Mr. Chairman, I have a formal statement which, with your permission, I would like to clean up and edit and then present into the record.

Senator HATCH. Without objection, we will put your complete formal statement in the record, and we will also put Ms. Levick's as well.

Professor WARDLE. I will to go into all of the detail that I go into in that written statement, but let me summarize these four points. The four impacts are, first, that the equal rights amendment would accelerate the adoption of many beneficial reforms in existing family laws in order to equalize the general rights and obligations of fathers and mothers and husbands and wives.

To that extent, it would encourage the independence and personal development of women both within and without the home. So it would definitely have some positive benefits. It would continue a trend. I will talk about that more.

Second, it would constitutionalize family law in an unprecedented way and by constitutionalizing it, make it rigid and Federal.

Third, the adoption of the ERA would insure an abundance of litigation, and fourth, if the ERA were adopted, it would significantly undermine State and Federal laws and policies which foster traditional families and which provide support for women who assume traditional roles as homemakers.

I want to expand very briefly on each of these points. The first point was that the ERA will have a positive impact in some areas, and I think everyone would acknowledge that, that one does not have to be a supporter of the ERA to recognize that it would, in fact, have this impact.

One can find that it would have also other impacts that are negative and that the ERA is overbroad, but at least it is clear that the debate over the ERA for the last 10 years has served as a catalyst for State legislative and judicial reform in the area of family laws.

It is reasonable to conclude that the impact of the ERA on many laws would be certainly noncontroversial. It would be insignificant because the policies and practices under existing family law could continue by merely substituting gender neutral statutory language or by clarifying previously unarticulated assumptions or intentions that the laws apply equally to men and women.

Thus, if the ERA were adopted, it would accelerate a trend which is already existing in this country of breaking down some of the rather rigid or coercively imposed stereotypes in the law of which there are not a great deal but which there are some that still hang around.

Family laws evolved over hundreds of years. Sometimes you have anachronistic provisions and those would have to be cleaned out. So I think at the outset we should acknowledge that that would be one impact, and if that were all the equal rights amendment would do, I think it would be supported without dissent.

Regrettably, it would do much more than that, and that is what causes the controversy.

The second point is that the equal rights amendment would provoke a great deal of litigation. For years after the equal rights amendment was adopted, disgruntled litigants would be able to make colorable claims that the particular rule of domestic relations law applied in their case violated the ERA, and it is common wisdom that family disputes and domestic relations law produces more dissatisfied clients and more disgruntled litigants than any other kind of civil litigation.

It is estimated that between a third and one-half of all the civil litigation in the State courts in this country is family law litigation, and I looked into the statistics of the survey of the U.S. courts and verified that it is true, that not even counting juvenile court proceedings, one-third to one-half, depending on the State, of all civil litigation is domestic law.

In each of these disputes the litigants would be able to add additional claims, now constitutional claims. They would be able to raise colorable constitutional arguments about the imposition of the particular rule that was applied in their case.

Now, one does not need to be a prophet to foresee that. The experience of the States that have adopted the ERA and the experience of growing claims under the 14th amendment provides a pretty strong evidence that this would, the impact of the adoption of the ERA, it would provoke or continue this kind of litigation. That is something that I think that the court system of the country does not need and would not welcome.

Senator **Hatch**. Can I interrupt you on that for a second, Professor Wardle? Some of the proponents of the equal rights amendment believe that if the equal rights amendment were added to the Constitution that it would reduce litigation because people would automatically obey its mandates. You seem to disagree with that.

Professor **Wardle**. I certainly do disagree with that. I think, if anything, it would provoke, it would give them another hook, another argument to make to go back to the court once more.

You have got to understand that it is not untypical for family disputes to be very bitter and for these proceedings to be very protracted and for the litigants to come back to the court again and again to try to enforce the order in another way or to secure enforcement or to modify enforcement of a prior order or decree.

Now, they would have another argument and another excuse to prolong the litigation. So, no, I do not think that it would reduce family law litigation. I think it would fuel the fires.

The third impact that I think is very certain to occur would be the constitutionalization of family law. For nearly 200 years or since our Constitution has been adopted, the regulation of families and of family relationships has been a matter deemed to be within the virtually exclusive province of the States. Historically, the Constitution has not had a very significant impact upon State regulation of domestic relations.

All of this would change if the equal rights amendment were enacted. I agree with Professor Freund's concern that he articulated more than a decade ago when the ERA was first being proposed in the earily 1970's in Congress then that adoption of the ERA:

> . . . would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common-law provision dealing with the manifold relations of women in society would be forced to run the gauntlet of attack on constitutional grounds.

The constitutionalization of family law would mean that local domestic disputes would have to be resolved in significant measure under a uniform national standard. The ability of States to experiment with different regulatory schemes and to respond to different local perceptions of the values and the balance of interests in family matters would be significantly curtailed because the equal rights amendment would be a constitutional provision. Deviation from the constitutional standard would be prohibited. Legislative reforms would be severely restricted. If the citizens of the State were displeased with the way the ERA were interpreted by a court, they could not simply go to their legislature to have the rule modified or amended or repealed. The traditional evolution of family law principles through the common-law development and through the legislative process of amendment and repeal would be replaced by the more inflexible and brittle process of constitutional adjudication.

Finally the Federal judiciary would have a much greater role in determining the substance of family law in this country. The members of the Supreme Court of the United States are, after all, the ultimate and final interpreters of the Constitution and what it means.

Thus, in many respects, they would be sitting as a superlegislature to determine domestic relations law that is applicable in Peoria, IL, and applicable in St. George, UT, and applicable in the Bronx.

The fourth impact, and the final impact that I will mention here and one that I want to take a little more time to emphasize, is that if the ERA were adopted, it would, in large respect, impair the legal rights of men and women who assume traditional family responsibilities.

I think the best example of this, they say sometimes a picture is worth a thousand words. I remember seeing a cartoon just a few months ago. It was about Halloween time, and I am not sure which cartoon it was.

It shows John, the main character of the cartoon, at his doorstep. It is at night, Halloween night. Two little girls are there. He is standing with the candy bowl. He says to them, "What are you?" And one of the girls says, "We are feminists." And the other says, "We believe in the dignity and worth of women everywhere."

And then a third little girl comes up to the doorstep and John asks her, "And what are you?" And she says, "I am a homemaker." The final frame of the cartoon shows the other two girls doubled over in laughter and pointing their finger in ridicule.

That is the concern that we have that the adoption of the equal rights amendment would have upon women who choose traditional family supportive careers, choose to forgo employment opportunities.

If the equal rights amendment were enacted, it would significantly impair laws and policies which support women who assume homemaking roles while the precise impact cannot be determined in some and, in fact, many issues, the overall impact is very clear.

In the words of Professor Herma Hill Kay: "Will ratification of the equal rights amendment require fundamental changes in traditional family life? Paradoxically both opponents and proponents agree that it would."

Adoption of the ERA would require a massive rewriting of domestic relations law in all States. One law professor wrote that the ERA would produce a cultural revolution of proportions beyond the kind of the proponents and that it would "minimize legal reinforcement of cultural mores supportive of family life, would tend to downgrade the homemaker's role," and would mandate a unisex family law policy.

The ERA embodies notions about family rights and responsibilities which, in some very significant particulars, run counter to the traditional roles of men and women and to traditional perspectives about marriage.

Indeed, the Maryland high court interpreting the State's ERA said: "It was intended to and did drastically alter traditional views of the validity of sex-based classifications."

The overall impact of the adoption of the ERA would be to abolish laws which are deferential to mothers and wives and which provide preferential treatment for homemakers and women who commit themselves to providing full-time care for their children.

By mandating strict equality of the sexes in all areas of family law, the ERA would effectively purge public policy of any special support for women who choose to become fulltime homemakers.

The problem here is that the ERA is intended not only to prohibit laws which coerce women into particular roles but also to prohibit incentives which encourage women to assume traditional roles in the family.

It would abolish modest rebuttal presumptions as well as rigid and absolute or irrebuttable rules. Under an absolute or a semiabsolute standard of review, the ERA would not only forbid lawmakers to acknowledge the distinction between a requirement and a mere preference, if any legal doctrine whether absolute or flexible contained a discriminatory element, it would be subject to exacting judicial scrutiny.

In short, by incorporating an absolute or near absolute standard of prohibition, the ERA unavoidably becomes, in my view, overbroad. It sweeps too broadly. It goes further than it should go and even than most people would intend it to go, but you cannot contain it if you use absolute standards and absolute language.

Thus, it is likely that the ERA would abolish even mere rebuttal presumptions, not requirements but mere presumptions, that a married woman takes the surname of her husband, that a married woman takes the domicile of her husband, that children take the surname and domicile of their fathers, that the husband and father is the primary provider of financial support for his family, and if all external factors regarding the ability of contesting parents to raise a child are equal, the benefit of the doubt should be given to the mother if the child is an infant.

I want to talk about that last point as a good example, for just a moment. The tender years doctrine is a good example of how overbroad the equal rights amendment would be. There is not one tender years doctrine in America, but there are actually three. All of them are predicated on the assumption and the belief that the bonding relationship between an infant or a young child and his or her mother is so important to the well-being and development of the child and thus to the future of society that the law should give some preference to and support for that relationship over other relationships.

Now, the oldest tender years doctrine was very strict, and it took this assumption and made it a rigid rule of law. The old doctrine was that in child custody disputes the mother of the child would be given custody unless the father could show that she was absolutely unfit, which was a very, very high standard, almost impossible in many cases.

The tender years doctrine also has a second rule, and the second doctrine provides that a mother will be awarded custody unless the father shows, by substantial or compelling evidence, that it would be better for the child for him to be awarded custody, and so that is not quite so strict. It just provides a lower standard of proof but still more than a 50-50.

The third and most widely used form of the tender years doctrine today, the one that is used in almost all States, because the other two have been pretty effectively abandoned as the courts have evolved, the third is the mere tie-breaker presumption that if all other factors, if all external factors are equal, the mother of a young child will be given custody on the benefit of the doubt. It is the tie-breaker.

It would appear that the equal rights amendment, at least it is strongly argued that the equal rights amendment would abolish all three of the "tender years" doctrines, not just the rigid and absolute but even the mere presumption.

In fact, even under State ERA's, in some States, that has been the result. The courts have said you cannot even indulge in that presumption. So some State ERA's have been given that interpretation, and that appears to be the rule that emerges from the comments of the people who have examined the potential impact of the ERA.

Economic laws, it is said, including family property rights creating benefits for women who prefer the homemaker role, that is, a noneconomic career, are probably within the proposed amendments prohibition. Under the ERA, economic systems may force more women out of the homemaker role, necessitate child care by the community rather than the family and increase urban/rural lifestyle differences.

Thus, the ultimate impact of the ERA would not be to break down stereotypes about sex roles but to throw out traditional notions of family responsibilities and sex roles and substitute a new unisex stereotype.

That is why if the ERA were adopted, people who see no need to foster families might rejoice while persons holding traditional notions about the great value of marriage and families would fear for the institutions and relationships they cherish.

There is no doubt that the social policies of the law of the States and of the Federal Government at present time and historically favors women who assume mothering and homemaking roles.

Many people believe that the contribution which a mother makes in the home is so beneficial to the children and to families and to society in general and to the future that women who choose to forgo other opportunities to devote their full time and attention to the family ought to be encouraged with special incentives and supported with special benefits.

These incentives and benefits and assumptions, mild as they are, nevertheless constitute a form of sex discrimination that would be threatened if the ERA were enacted. The authorities I have reviewed appear very solidly to support the conclusion that if the ERA were adopted, family laws and policies which encourage women to be full-time homemakers and which encourage men to assume the primary responsibility of support for the family by extending to them benefits and exemptions and legal presumptions based on those notions would be prohibited if they did not extend equally to the other sex.

I think I will give one more example in conclusion, with your permission, Mr. Chairman, and a good example of the problem in this area is the tension between writing a law so tightly that a past problem or a past abuse does not occur again and making it so tight that it creates a new system of abuse.

The debate between equal distribution and equitable distribution of property acquired during marriage is a good example. Some people favor a strictly equal distribution of property so that there would be no room for subjective presumptions about the man's or the woman's role in marriage or in acquiring property.

But others argue that to require a strict equal distribution would work to detriment many women who assume traditional roles in the family. For instance, if the woman who takes custody of five children gets half of the property and the man alone walks off with the other half, some people wonder whether, in fact, fairness has been achieved.

Or where an outrageously offending spouse is allowed to be given half of the property acquired during marriage and the other party who has to overcome the disadvantage of the abuse that was inflicted only gets an equal share, some people feel that justice has not been done.

So if you require a strict standard, you cannot do justice in individual cases, but if you require a flexible standard so you can do justice in individual cases, there is the possibility that particular presumptions and notions about what a fair distribution and fairness is would sneak back into the law, things that people do not like.

Well, that concludes the essential points that I want to make. I want to conclude by saying that no one knows for sure what impact the ERA would have. My remarks are based on the assumption that it would require very exacting and a strict standard of scrutiny and I think that the impact could be detrimental for the fourth reason that I gave and I have real concern.

[The prepared statement of Professor Wardle follows:]

THE IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT UPON FAMILY LAW

Testimony of Lynn D. Wardle
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Given before the Subcommittee on the Constitution
of the Senate Judiciary Committee,
June 22, 1984.

I. *Introduction*.

I am honored to have been invited to testify before the Subcommittee on the Constitution of the Senate Judicial Committee regarding the potential impact which adoption of the Equal Rights Amendment would have upon family law in America. I commend the members of the committee and the members of the Senate for their attention to this issue. This is a matter of widespread concern in the United States today. In fact, it has been shown that married women without outside sources of income, i.e. traditional mothers and housewives, constitute one of the most potent groups of opponents to the passage of the Equal Rights Amendment.[1] The opposition of mothers, housewives, and of many other women and men who value the constitution of mothers and housewives to our society, reflects their concerns about the effect which the Equal Rights Amendment would have upon traditional family relations and responsibilities.

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[1] *Jones, E.R.A. Voting: Labor Force Attachment, Marriage Religion*, 12 J. Legal Stud. 157 (1983).

To begin, I want to emphasize that no one knows for certain what effect adoption of the Equal Rights Amendment would have upon laws in general, or upon Family Laws in particular. The outcome of challenges to existing family laws that would be brought under the Equal Rights Amendment if it were adopted cannot be forecast with certainty at this time because the arguments pro and con have not been presented thoroughly, the evidence has not been completely marshalled, and the intent of the proposed Amendment--which, after all, is still in Committee--is not clear. Also, there is considerable uncertainty over the exact standard of scrutiny that would be generally applied if the ERA were adopted, and over the standard of review that would be applied to family laws in particular. Many proponents of the ERA, as well as opponents,[2] believe that the proposed Amendment is meant to prohibit, and probably would be interpreted to prohibit, all laws which treat men and women differently except those necessary to accomodate "unique physical characteristics" of the sexes and those which protect the right to privacy.[3] But the

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[2] *See generally*, R. Lee, *supra* note 1, at 39-54; O. Hatch, *supra* note 1, at 13-16; Brown, Emerson, Falk & Freedman, *supra* note 1, at 894.

[3] It is possible (albeit certainly not probable) that the qualification to the rule of absolute prohibition of sex discrimination to accomodate the constitutional right of privacy could encompass family interests. Many aspects of family life and family relations have been held to be protected by the constitutional right of privacy. *See, e.g.,* Parham v. J.R.,442 U.S. 584 (1979)(right of parents to commit children to mental hospital for diagnosis and treatment); Zablocki v. Redhail, 434 U.S. 374 (1978)(right of support-obligated indigents to marry); Moore v. City of East Cleveland, 431 U.S. 494 (1977)(right of extended family to

(Footnote 3 continued on next page)

exact standard of review has not yet been authoritatively declared and the standards of judicial review applied under the state ERAs have been varied and inconsistent.[4]

While the specific impact of the adoption of the Equal Rights Amendment on many family law issues can not be precisely foretold, I believe that the adoption of the Equal Rights Amendment would certainly have four general consequenses upon American family laws. First, we can be sure that there would be an abundance of litigation challenging virtually every facet of existing family laws. Second, adoption of the Equal Rights Amendment would constitutionalize family law in an unprecedented way. Third, the Equal Rights Amendment would have a very positive benefit of equalizing the general rights and obligations of mothers and fathers and husbands and wives, and would encourage independance and development of women both within and without the home. Finally, if the Equal Rights Amendment were adopted it would signifigantly impare family laws and policies which support women who assume their traditional roles of wives and mothers.

II. Adoption Of The Equal Rights Amendment Would Provoke An Enormous Amount Of Litigation.

(Footnote 3 continued from previous page) reside together); Meyer v. Nebraska, 262 U.S. 390 (1923)(right of parents to educate children in foreign language).

[4] Avner & Green, *supra* note 1, at 4025; Kurtz, *supra* note 1, at 109, Comment, *supra* note 1, at 1089; Annot., *supra* note 1, at 172-176.

For years after passage of the Equal Rights Amendment, disgruntled litigants would be able to make a colorable claim that the particular rule of domestic relations law applied in their case violated the ERA. And it common wisdom that family disputes produce more dissatisfied clients and disgruntled litigants that any other type of civil litigation. It is estimated that between one third and one half of all civil litigation in the United States is family law litigation (not counting juvenile court litigation.)[5] and the trend has been for family law litigation to grow over the past decade or so [6] The trend would not only continue but would accelerate if the ERA were adopted.

The number and variety of family laws or legal doctrines that could be challenged in court if the Equal Rights Amendment were adopted is staggering. One does not need to be a prophet to foresee that development; the experience of the states which have enacted Equal Rights Amendments provides a very sobering sample of the kinds and number of issues that would be raised and would have to be decided. Likewise, recent challenges to family laws based upon the equal protection clause of the fourteenth amendment reveal issues that would be likely to surface again under the ERA.

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[5] Hennessey, *

[6] See Wardle, *

With the help of a capable research assistant, Sheila Burger, I have reviewed a sampling of the state court cases in which laws regulating family relations have been challenged under state Equal Right Amendments. I have also reviewed a sampling of cases deciding family law issues under the equal protection clause of the fourteenth amendment. And I have read what a number of legal scholars have written about the probable effects of the ERA on family law.[7] From these sources I have compiled a list of questions that almost certainly would be raised if the federal Equal Rights Amendment were adopted, because these questions have already been raised under state Equal Rights Amendments or under the equal protection clause of the fourteenth amendment.

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[7] B. Brown, A. Freedman, H. Katz & A. Price, Women's Rights and the Law, (1977); M. Childs, Fabric of the ERA Congressional Interest (1982); M. Clark, Domestic Relations Cases and Problems (3d ed 1980); O. Hatch, The Rights Amendment: Myths and Realities (1983); H. Kay, Sex-Based Discrimination (2d ed 1981); R. Lee, A Lawyer Looks at the Equal Rights Amendment (1980); J. Nowak, R. Rotunda, J. Young, Constitutional Law (2d ed 1983); L. Tribe, American Constitutional Law (1978); United Comm'n on Civil Rights, The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution (1981); United States Comm'n on Civil Rights, Statement on the Equal Rights Amendment (1978); W. Weyrauch & S. Katz, American Family Law in Transition (1983); Avner & Greene, *State ERA Impact on Family Law*, 8 Family L. Rep. 4023 (1982); Bingaman, *The Impact of the ERA on Marital Economics* in Calif. Comm'n on the Status of Women, Impact ERA, Limitations and Possibilities 116 (1975); Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871 (1971); Elsen, Coogan & Ginsburg, *Men Women and the Constitution: The Equal Rights Amendment*, 10 Colum. J. L. & Soc. Prob. 77 (1973); Jones, *ERA Voting: Labor Force Attachment, Marriage, and Religion*, 12 J. Legal Stud. 157 (1983); Kurtz, *State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 Family L. Q. 101 (1977); Ryman, *A Comment on Family Property Rights and the 27th Amendment*, 22 Drake L. Rev. 505 (1973); Weitzman, *Legal Equality in marriage and Divorce: The ERA's Mandate,* in Calif Comm'n on the Statuts of Women Impact ERA, Limitations and Possiblities 184 (1975); Comment, *Equal Rights Provosions: The Experience Under State Constitution*, 65 Cal. L. Rev. 1086 (77); Note, *Effect of the Equal Rights Amendment on Kentucky's Domestic Relations Law*, J. Family L. 151 (1972); Annot, 90 ALR 3d 158 (1979); *See also*, A. Bingaman, A Commentary on the Effect of the Equal Rights Amendment On State Laws and Institution (undated).

(A) Questions Concerning the Creation of a Husband-Wife Relationship.

If the ERA is adopted, it will be claimed that the ERA abolishes the traditional rule authorizing women to bring actions for breach of promise to marry,[8] that statutory and common law prohibitions of homosexual marriage violate the ERA,[9] and that laws allowing girls to marry (usually with parental consent) at a younger age than boys violate the ERA,[10]

(B) Question Regarding the Rights and Responsibility Of Spouses During Marriage.

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[8] Scanlon v. Crim, 500 S.W.2d 554 (Tex. Civ. App. 1973) (action for breach of promise to marry is not abolished by state ERA amendment; man also may recover even though they have not done so in past).

[9] Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) (statutory prohibition of same-sex marriages does not violate state ERA; DeSanto v. Barnsley, 10 FLR 1425 (Pa Super May 11, 1984) (male homosexuals cannot contract common law marriage under state common law; court declines to consider whether this common law rule violates state ERA because issue not properly raised). *See also* Note, *The Legality of Homosexual Marriage* 82 YALE L. J. 573, 588 (1973) (arguing that "the proposed ERA should be interpretted as prohibiting the universal denial of marriage licenses to same-sex couples").

[10] Moe v. Dinkins, 669 F.2d 67 (2d Cir. 1982)(sex discriminating parental consent requirements do not violate fourteenth amendment); *compare* Friedrich v. Katz, 73 Misc. 2d 663, 341 N.Y.S.2d 932 (Super. Ct. 1973) (constitutional) *with* Berger v. Adornato, 76 Misc. 2d 122, 350 N.Y.S.2d 520 (Super. Ct. 1973)(unconstitutional) *and* Phelps v. Bing, 58 Ill. 2d 6, 316 N.E.2d 775 (1974)(violates state ERA).

If the ERA is adopted it will be argued: that the common law rule that allows husbands to recover for alienation of affections or to prosecute for criminal conversation violate the ERA,[11] that provisions allowing for the collection of a wife's taxes from her husband's wages violate the ERA,[12] that use of the term "housewife" in tax statutes violates the ERA,[13] that it violates the ERA to charge males higher insurance rates,[14] that regulations providing women with greater exemptions or deductions in computing old age benefits violate the ERA,[15] that it violates the ERA to charge female policyholders of disability insurance higher rates that men,[16] that employment regulations denying a wife unemployment compensation because she is not a "major support" of the family violates the ERA,[17] that a requirement of financial disclosure by "head of household" of family of elected official violates the ERA,[18] that it violates the ERA to provide certain social security benefits to women married to former workers' but not to divorced women,[19] that denial of recovery for loss of consortium to wives but not to husbands violates the ERA,[20]

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[11] Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980) (common law cause of action for criminal conversation violates state ERA because only a man can sue or be sued); Felsenthal v. McMillan, 493 S.W.2d 729 (Tex. 1973) (state ERA could either abolish action for alienation of affection or criminal conversation or extend same rights to wife).

[12] Burchanowski v. County of Lycoming, 32 Pa. Commw. 2[illegible], 378 A.2d 1025 (1977) (court dismissed case for lack of standing to appeal from lower court ruling on the issue deciding against plaintiffs that housewife is an occupation, but held that taxation of housewives, an exclusively female class, violates state ERA, and also that provision allowing for collection of wife's taxes from husband's wages but not vice versa violates state ERA).

[13] Id.

[14] Hartford Accident & Indemnity Co. v. Ins. Comm'n, 65 Pa. Commw. 249, 442 A.2d 382 (1982) (Insurance Commissioner's determination that sex-based auto insurance rate structure was "inherently unfairly discriminatory" upheld); Murphy v. Harleysville Mutual Ins. Co., 282 Pa. Super, 244, 422 A.2d 1097 (1980) (cert. denied, 454 U.S. 896 (1981) (discrimmatory insurance rates for males do not violate state ERA because they are result of purely private contracts).

[15] Califano v. Webster, 430 U.S. 313 (1977) (fourteenth amendment not violated by such scheme).

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[16] Bronstein v. Sheppard, 50 Pa. Commw. 199, 412 A.2d 672 (1980) (suit in equity charging insurers and insurance commissioner with violating state ERA by charging higher rates for female policyholders of disability insurance and approving rate filings which provide for higher premium payments for women dismissed because of adequate remedy at law).

[17] Guinn v. Commonwealth of Pennsylvania Unemployment Compensation Bd. of Review, 33 Pa. Commw. 596, 382 A.2d 503 (1978) (rule denying a wife unemployment compensation because she is not "major support" of the family does not violate state ERA).

[18] Snider v. Thornburgh, 496 Pa. 159, 436 A.2d 593 (1981) (financial disclosure provision applicable to "heads of households" of families of elected officials does not violate state ERA even though refusal of husband of elected official to disclose his financial affairs meant she was disqualified).

[19] Matthews v. deCastro, 429 U.S. 181 (1976) (secondary benefits available to women married to retired workers upheld).

[20] Miller v. Whittlesey, 562 S.W.2d 904 (Tex. Civ. App. 1978) aff'd, 572 S.W.2d 665 (Tex. 1978) (state ERA modified common law so that wife now has cause of action for negligent impairment of consortium); Lundgren v. Whitney's Inc., 94 Wash. 2d 91, 614 P.2d 1272 (1980) (prior rule that denies

(Footnote 20 continued on next page)

that it violates the ERA to require a woman to assume the legal surname of her husband upon marriage,[21] that support regulations providing smaller mandatory exemptions for working women with children than for working men with wives and children violates the ERA,[22] that the common law form of tenancy by the entireties whereby the wife has no right to immediate control of the property, but has a suvivorship interest that cannot be reached by creditors, violates the ERA,[23] that the one-way presumption

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(Footnote 20 continued from previous page) damages to a wife for loss of consortium violates state ERA); Hopkins v. Blance, 457 Pa. 90, 320 A.2d 139 (1974) (under state ERA wife may recover damages for loss of consortium); Schreiner v. Fruit, 519 P.2d 462 (Alaska 1974) (wife allowed to sue for loss of consortium; otherwise state ERA violated).

[21] Doe v. Dunning, 87 Wash. 2d 50, 549 P.2d 1 (1976) (dictum: should federal ERA be ratified, doubtful whether any state could compel woman to change her legal surname upon marriage); Custer v. Bonadies, 30 Conn. Supp. 385, 318 A.2d 639 (1974) (by court holding that married woman have right to vote to register in their maiden names; state ERA mentioned).

[22] Page v. Welfare Comm'n, 170 Conn. 258, 365 A.2d 1118 (1976) (filial support regulation providing smaller exemption for a working woman w/ children and husband than for a working man with wife and children violates state ERA).

[23] West v. First Agricultural Bank, 382 Mass. 534, 419 NE2d 262 (1981) (declining to give retroactive relief, and thus to rule upon wife's claim that Massachusetts form of tenency by the entirety whereby husband had right of control and possession during lifetime and survivorship right which could be reached by creditors, while the wife had no right of control or possession during husband's lifetime, but her survivorship right was immune from creditor violated state ERA).

that where a husband obtains his wife's property without adequate consideration he holds the property in trust for her violates the ERA,[24] that the presumption that wife's interest in property purchased by husband and held by the entireties is a gift violates the ERA,[25] that wives are financially liable for the necessary expenses of their husbands,[26] that coverture is abolished,[27] that statutes which criminally punish only a husband for failure to support his wife or deserting his wife violate the ERA,[28] that the presumption that a husband is the dominant figure in marriage violates the ERA,[29] that the presumption of confidential relations between spouses violates the ERA,[30] that the presumption that husbands and wives take property as tenants by the entireties violates the ERA,[31] that the presumption that the husband is the legal owner of household goods used and possessed by both spouses violates the ERA,[32] and that the presumption that a wife has the same domicile as her husband violates the ERA.[33]

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[24] Butler v. Butler, 464 Pa. 522, 347 A.2d 477 (1975) (presumption that where husband obtains wife's property without adequate consideration trust created in wife's favor violates state ERA).

[25] Id.

[26] Manatee Convalescent Center, Inc. v. McDonald, No. 80-714, slip op. (Fla. Dist. Ct. App. Dec. 31, 1980) (wife liable for necessaries of husband, decision to be applied prospectively; Pennsylvania ERA cited); Condore v. Prince George's County, 289 Md. 516, 425 A.2d 1011 (1981) (common law doctrine of necessaries and statute relating to husband's liability for wife's necessaries both violate state ERA).

[27] Michigan National Leasing Corp. v. Cardillo, 103 Mich. App. 427, 302 N.W.2d 888 (1981) (wife liable for breach of lease agreement signed with husband because of state constitutional abolishment of coverture and approval of ERA); Wendland v. Citizens Commerical & Savings Bank, 92 Mich. App. 250, 284 N.W.2d 776, (1979) (wife's separately owned stock which she assigned to furnish collateral for notes executed jointly with husband can be made liable for debt; state ERA supports holding wife liable).

[28] Coleman v. State of Maryland, 37 Md. App. 322, 377 A.2d 553 (1977) (conviction of man for violating statute which criminalizes husband's action in failing to support wife and deserting wife but which does not create reciprocal crimes for wife violates state ERA).

(C) Questions Regarding the Dissolution of Marriage and Relations Between Ex-Spouses After Dissolution.

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[29] Eckstein v. Eckstein, 38 Md. App. 506, 379 A.2d 757 (1978) (since adoption of state ERA courts have abandond previous presumption that husband wsa the dominant figure in a marriage); Bell v. Bell, 38 Md. App. 10, 379 A.2d 419 (1977) (presumption that husband is dominant figure in marriage cannot stand under state ERA).

[30] Id.; McClellan v. McClellan, 52 Md. App. 525, 451 A.2d 334 (1982) cert. denied, 103 S.Ct. 3119 (1983) (state ERA does not permit presumption of confidential relationship between spouses in suit by wife to set aside settlement agreement).

[31] Margarite v. Ewald, 252 Pa. Super, 244, 381 A.2d 480 (1977) (reject claim that presumption that Husband and Wife take property as tenants by the entireties, absent contrary language, violates state ERA).

[32] DiFlorido v. DiFlorido, 459 Pa. 641 331 A.2d 174 (1975) (common law doctrine presuming husband is legal owner of household goods used and possessed by both spouses violates state ERA).

[33] Geesbreght v. Geesbreght, 570 S.W. 2d 427 (Tex. Civ. App. 1978) (In determining jurisdiction in divorce and custody case, "domicile by operation of law" cases decided prior to adoption of state ERA are of little value).

If the Equal Rights Amendment is adopted litigants will claim: that statutes allowing a wife only to obtain a divorce from bed and board or separate maintenance violate the ERA,[34] that common law alimony violates the ERA,[35] that provisions that a wife's will may not operate to deprive her husband of more than two-thirds of her property violates the ERA,[36] that statutes which afford wives but not husbands in rem support remedies violate the ERA,[37] that government benefits for widows may not be any greater than those for widovers,[38] that statutes providing

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[34] George v. George, 487 Pa. 133, 409 A.2d 1 (1979) (statute allowing wife to obtain divorce from bed and board not violative of state ERA because read to provide reciprocity of remedies for spouses); Peters v. Marick, 270 S.E.2d 760 (W. Va. 1980) (separate maintenance statute allowing only wives to obtain relief violates both federal and state equal protection statutes unless applied in gender-neutral fashion; state ERA indicative of strong public policy); Wiegand v. Wiegand, 461 Pa. 482, 337 A.2d 256 (1975) (reversing superior court's action sua sponte declaring that provisions of state divorce law, divorce from bed and board, alimony pendente lite, violates state ERA).

[35] Hofmann v. Hofmann, 50 Md. App. 240, 437 A.2d 247 (1981) (common law alimony not abolished by state ERA).

[36] In re Estate of Kujath, 169 Mont. 128, 545 P.2d 662 (1976) (statute providing that wife's will without written consent of husband, may not operate to deprive him of more than 2/3 of her property does not violate state ERA).

[37] Commonwealth ex. rel. Stein v. Stein, 487 Pa. 1, 406 A.2d 1381 (1979) (statutes which afford wives but not husbands in rem support remedies violate state ERA).

[38] Klien v. Shevin, 416 U.S. 351 (1974) (statutory exemption from property tax for widowers only does not violate fourteenth amendment); Wienberger v. Weinberger, 420 U.S. 636 (1976) (payments to surviving widow but not widower are unconstitutional); Wengler v. Druggists Mutual Ins. Co., 446

(Footnote 38 continued on next page)

for payment of alimony pendente lite and counsel fees to dependent wives only violate the ERA,[39] that it violates the ERA to award counsel fees without taking into condition the financial circumstances and abilities to pay of both parties,[40] and that exemption of a wife from liability for funeral expenses of her husband violates the ERA.[41]

(D) Questions Regarding the Creation of The Parent-Child Relationship.

If the ERA is adopted it will be claimed: that the ERA requires states to allow a man to bring an action to determine that he is the father of a child that was born to a woman while

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(Footnote 38 continued from previous page)
U.S. 142 (1980); (Workers Compensation law providing benefits to widows on more favorable terms than to widowers unconstitutional).

[39] Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974) (statute providng for payment of alimony pendente lite, counsel fees, and expenses to wife in divorce action but not to hsuband violates state ERA); Commonwealth ex. rel. Lukens v. Lukens, 224 Pa. Super. 227, 303 A.2d 522 (1973) (in view of reciprocal arrangements existing under support-statutes, statute allowing for awards of alimony pendente lite and costs to wives but not husbands do not violate state ERA); Anagnostopoulos v. Anagnostopoulos, 22 Ill. App. 3d 479, 317 N.E. 2d 681 (1974) (attorneys fees awarded to both parties); Schaab v. Schaab, 87 N.M. 220, 531 P.2d 954 (1974).

[40] Tidler v. Tidler, 50 Md. App. 1, 435 A.2d 489 (1981) (in awarding counsel's fees, state ERA requires financial circumstances and ability to pay of both parties to be considered).

[41] In re Rollman's Estate, 71 Pa. D. & C. 2d 6 (1975).

she was married to another man,[42] that an unmarried mother cannot release her child for adoption without the full consent of the unwed father,[43] that statutes of limitations on paternity actions violate the ERA,[44] that laws which restrict abortion or the public funding of abortion violate the ERA,[45] that filiation statutes violate the ERA.[46]

(E) Questions Regarding the Continuing Relations Between Parents And Children.

If the ERA is adopted it will be argued: that statutory exemptions from jury duty for women with children violate the

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[42] R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980) (state ERA grants man right to bring action for determination of his paternity of child born during marriage of natural mother to another).

[43] In re Baby Girl S, 628 S.W.2d 261 (Tex. Civ. App. 1982), vacated and remanded, 103 S.Ct. 1760 (statute which gives unwed mother greater rights than biological father to raise or release for adoption child born out of wedlock does not violate state ERA); In re Adoption of Walker, 468 Pa. 165, 360 A.2d 603 (1976); (vacating adoption of illegitimate child on consent of unwed mother only).

[44] In re Interest of Miller, 605 S.W.2d 332 (Tex. Civ. App. 1980), aff'd 631 S.W.2d 730 (1981) (one-year statute of limitations on paternity actions but not maternity actions violates state ERA).

[45] Fischer v. Commonwealth, 10283 CP 1981 (common. ct. Pa. Feb. 7, 1984); Moe v. Secretary of Administration and Finance, 382 Mass. 629 417 N.E.2d 387 (1981).

[46] State v. Wood, 89 Wash 97, 569 P.2d 1148 (1977) (filiation statute applicable only to putative fathers does not violate state ERA).

ERA,[47] that age differences in the jurisdiction of juvenile court for girls and boys violates the ERA,[48] that laws authorizing imprisonment of fathers for failure to pay child support violate the ERA,[49] that the traditional rule that fathers have the primary obligation to support the children, and that mothers are only liable for the support of the children to the extent that their fathers are unable to support them, violates the ERA,[50]

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[47] Johnson v. State, 548 S.W.2d 700 (Tex. Crim. App. 1977) (statutory exemption from jury duty for women with legal custody of children under 10 years of age does not violate ERA). See also Taylor v. Louisianna, 419 U.S. (1975); (automatic jury exemption for women violates Sixth Amendment); Duren v. Missouri, 439 U.S. 357 (1979) (exemption from jury duty on request violates Sixth Amendment).

[48] People v. Ellis, 57 Ill.2d 127, 311 N.E.2d 98 (1974) (sex-based age difference in jurisdiction of juvenile court (17 years for boys but 18 for girls violates state ERA). See Annot., 90 A.R 3d at 204 n. 3.

[49] Kerr v. Kerr, 287 Md. 363, 412 A.2d 1001 (1980) (statute authorizing imprisonment for failure to pay child support does not violate either equal protection or sate ERA); Ulrich v. Ulrich, 652 S.W.2d 503 (Tex. Civ. App. 1983) (state ERA and statute do not mean that mother and father must contribute equally to child support but each is obliged to supply money or services according to his or her ability and needs of children).

[50] Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977) (following adoption of state ERA, parental obligation for child support no longer primarily an obligation of father but one to be shared; sex of parent cannot be a factor in allocating responsibility to support child; rejects claim that mother liable only to extent father cannot support children); Kemp v. Kemp, 287 Md. 165, 411 A.2d 1028 (1980) (after passage of state ERA, obligation to pay for necessaries in support of minor children no longer primarily father's duty but shared by both parents); Commonwealth ex rel. Travitzky v. Travitzky, 230 Pa. Super. 435, 326 A.2d 883 (1974) (under state ERA, equal responsibility is upon both parents, where

(Footnote 50 continued on next page)

that the ERA requires mothers who have the potential earning power to contribute equally to the financial support of their children,[51] that statutes which impose liability on fathers only for the support of their children born out of wedlock violate the ERA.[52]

(F) Question: Regarding Parent-Child Relations After Death,

(Footnote 50 continued from previous page) they are financially able, to support their children); Smith v. Smith, 13 Wash. App. 381, 534 P.2d 1033 (1975) (state ERA requires equal responsibilities for child support); Smith v. Smith, 651 S.W.2d 953 (Tex. Civ. App. 1983) (state ERA and statute confer equal rights and equal obligations on both father and mother to provide child support); Kaper v. Kaper, 227 Pa. Super. 377, 323 A.2d 222 (1974) (under state ERA, it was error not to take into consideration income of mother in awarding child support).

[51] Commonwealth ex. rel. Wasiolek v. Wasiolek, 251 Pa. Super. 380 A.2d 400 (1977) (support rule permitting nurturing parent children 7,9,11 to remain in home until child matures does not violate state ERA; court need not consider mother's earning capacity in assessing child support); Stern v. Stern, Md. App. ____, 473 A.2d 56 (Ct. S___ App. 1984) (the duty to support children is a joint duty under state ERA obligation of father to pay $100 per month and mother to provide room and board with $200 only does not violate state ERA; Shapera v. Levitt, 260 Pa. Super. 447, 397 A.2d 1011 (1978) (state ERA requires that both parents discharge child support obligation in accordance with their capacity and ability); Friedman v. Friedman, 521 S.W.2d 111 (Tex. Civ. App. 1975); (state ERA does not require mathematically equal support but does impose equal obligation on each parent in accordance with ability to contribute money or services).

[52] Commonwealth v. Baggs, 258 Pa. Super. 133, 392 A.2d 720 (1978) (sex-neutral criminal statute punishing the failure to support a bastard child does not violate state ERA); Commonwealth v. Rebovich, 267 Pa. Super. 254, 406 A.2d 791 (1979) (statute making failure to support child born out of wedlock a misdemeanor read to be sex neutral and does not violate state ERA); Commonwealth v. Vagnani, 272 Pa. Super. 396, 416 A.2d 99 (1979) (statute making failure to support child born out of wedlock a misdemeanor construed to be sex-neutral and does not violate state ERA).

Divorce or Termination.

If the Equal Rights Amendment is adopted it will be claimed in court: that the earning potential, not just the actual earnings, of divorced women with children in their custody must be considered in assessing the amount of child support they receive,[53] that orders granted without consideration of the mother's resources will not be enforced after the adoption of the ERA,[54] that the earning potential, not just the actual earnings of divorced women with custody must be considered in determining how much child support they will receive,[55] that any preference

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[53] Commonwealth ex. rel. Wasiolek v. Wasiolek, 251 Pa. Super. 380 A.2d 400 (1977) (support rule permitting nurturing parent children 7,9,11 to remain in home until child matures does not violate state ERA; court need not consider mother's earning capacity in assessing child support); Shapera v. Levitt, 260 Pa. Super. 447, 397 A.2d 1011 (1978) (state ERA requires that both parents discharge child support obligation in accordance with their capacity and ability).

[54] Slavis v. Slavis, 12 Ill. App. 3d 467, 299 N.E. 2d 413 (1973) (rejecting man's claim of retroactive application of state ERA).

[55] Urban v. Urban, 298 Pa. Super, 224, 444 A.2d 742 (1982) (state ERA does not require mother of young children to return to work to contribute to support of children); Commonwealth ex. rel. Wasiolek v. Wasiolek, 251 Pa. Super. 380 A.2d 400 (1977) (support rule permitting nurturing parent children 7,9,11 to remain in home until child matures does not violate state ERA; court need not consider mother's earning capacity in assessing child support); Kemp v. Kemp, 287 Md. 165, 411 A.2d 1028 (1980) (after passage of state ERA obligation to pay for necessaries in support of minor children no longer primarily father's duty but shared by both parents); Krempp v. Krempp, 590 S.W.2d 229 (Tex. Civ. App. 1979) (court rejects husband's argument that $1000 per month child support violates statutory duty of support in light of state ERA; nonmonetary contribution of custodial

(Footnote 55 continued on next page)

for the mother in child custody hearings violates the ERA,[56] that the prima facie presumption that a mother is a better custodian for a child of tender years violates the ERA,[57] and that even a mere "tie-breaker" presumption (when all other evidence is equal) that a mother of a child of tender years should be awarded custody violates the ERA,[58] that it violates the ERA if

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(Footnote 55 continued from previous page)
mother must be taken into account); In re Marriage of Trask, 580 P.2d 825 (Colo. App. 1978) (argument that state ERA requires pregnant mother to get a job to support child deemed frivolous).

[56] In re Custody of Hernandez, 249 Pa. Super. 274, 376 A.2d 648 (1977) (adoption fo state ERA abolished tender years presumption entirely); McGowan v. McGowan, 248 Pa. Super. 41, 374 A.2d 1306 (1977) (tender years presumption violates state ERA); Beichner v. Beichner, 294 Pa. Super. 36, 439 A.2d 737 (1982) (state ERA abolished tender years presumption); Bedio v. Bedio, 268 Pa. Super. 231, 407 A.2d 1331 (1979) (vacating lower court decision that placed too much emphasis on tender years doctrine.

[57] Commonwealth ex. rel. Weber v. Weber, 272 Pa. Super. 88, 414 A.2d 682 (1979) (tender years presumption as prima facie rule violates state ERA); Commonwealth ex. rel. Scott v. Martin, 252 Pa. Super. 178, 381 A.2d 173 (1977). (concurrence states that to prefer mother's custody claim to father's violates state ERA); See also, Randolph v. Dean, 27 Ill. App. 3d 913, 327 N.E.2d 473 (1975); marcus v. Marcus, 24 Ill. App. 3d 401, 320 N.E. 2d 584 (1974).

[58] Cooke v. Cooke, 21 Md. App. 376, 319 A.2d 841 (1974) (state ERA abolishes maternal preference in custody disputes except when evidence inconclusive); McAndrew v. McAndrew, 29 Md. App. 1, 382 A.2d 1081 (1978) (maternal preference tie-breaker rule abolished by statute, therefore, state ERA need not be considered; Cooke overruled); Marriage of Murray v. Murray, 28 Wash. App. 187, 622 P.2d 1288 (1981) (under state ERA continued viability of tender years presumption is uncertain must be used as tie-breaker); Cox v. Cox, 532 P.2d 994 (Utah 1975) (tender years doctrine does not violate state traditional "equal rights" amendment; Ex parte Devine, 398 So. 2d 686 (Ala. 1981) (tender years presumption
(Footnote 58 continued on next page)

significantly more women than men are awarded custody, in contested cases,[59] that presumption that wife is entitled to maximum one-third of husband's earnings for spousal support following divorce violate the ERA,[60] that a system of custody award under which somen are awarded custody in more cases than men violates the ERA,[61] and that statutes restricting the right of illegitimate children to inherit from their putative fathers violate the ERA.[62]

III. Family Law Would Be Constitutionalized Signifigantly If The Equal Rights Amendment Were Adopted.

(Footnote 58 continued from previous page) unconstitutional; court discusses fact that in four states, tender years presumption remains in effect despite state ERA or contrary statute language); Broussard v. Broussard, 320 So. 2d 236 (La. App. 1975) (tender years assumption upheld); Randolph v. Dean, 27 Ill. App. 3d 913, 327 N.E.2d 473 (1675) (permissible to consider maternal instinct).

[59] In re Marriage of Franks, 542 P.2d 845 (1975) (rejecting claim of ERA violation because statistics showing more women awarded custody did not reveal if those cases were contested by men who wanted custody).

[60] Holmes v. Holmes, 127 P.L.J. 196 (Ct. Common Pleas 1978) (cited in Avner & Greene, supra note 1, at 4035).

[61] In re marriage of Franks, 542 P.2d 845 (1975) (rejecting man's claim that state ERA violated by pattern of warding custody to women in most cases).

[62] In re Succession of Brown, 379 So. 2d 1172 (La. App. 1980) (statute excluding acknowledge illegitimates from participating in succession of their father when he is survived by legitimate descendants violates state ERA; Lowell v. Kowlski, 398 Mass. 663, 405 N.E.2d 135 (1980) (law allowing illegitimate child to inherit from natural mother but not natural father violates state ERA).

For nearly two hundred years the regulation of family relationships has been a matter deemed to be within the exclusive province of the states.[63] Historically, the Constitution has not had a very significant impact upon state regulation of domestic relations.

During the past decade or so, federal courts have exercised a greater degree of scrutiny of state family laws, usually acting under the privacy doctrine.[64] But less than two years ago, the United States Supreme Court held that federal courts could not hear habeas corpus actions to hear constitutional challenges to state court custody determinations.[65] Indeed, much of the federal court involvement in family law results from growing federal regulation çoncerning taxation, bankruptcy, millitary personnel, etc.[66]

All of this would change if the Equal Rights Amendment were enacted. I agree with Professor Freund's concern that if the ERA were enacted it would transform virtually every issue regarding womens rights into a constitutional issue.[67] This would mean that

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63. Sosna v. Iowa 419, US 393 (1975).

64. See, Lehr B. Robertson, 103sct2985 (1983); Santosky Kramer, 455 US 745 (1982);*

65. Lehman v. Lycoming County Childrens Services Agency, 102 S. Ct. (1982).

66. See K. Redden, Federal Regulation of Family Law (1982).

67. See Elsen, Coogan, Ginspurg, supra, note 1, at 81.

family law disputes would be resolved under a uniform national standard. The ability of the states to experiment with different regulatory schemes would be curtailed. It would not be entirely abolished, but there would be a profound tendency toward nationalization. Because the Equal Rights Amendment would be a constitutional provision, deviation from the constitutional standard would be prohibited. Legislative development and reform of the law would be severely restricted. If the citizens of a state were displeased with the way the Equal Rights Amendment were interpreted, they could not simply go the their legislature and have the rule modified or repealed. The traditional evolution of family law principles through common law development and legislative enactment, amendment, and repeal would be replaced by the more brittle and inflexible process of constitutional adjudication.

Finally, if federal judiaciary would have a much greater role in determining the substance of family law in this country. The federal judges are the ultimate interpreters of the Constitution; thus, in some respects they would be sitting as a super legislature to establish domestic relations law.

Of course, other provisions of the Constitution already apply to states and family laws. But none of the provisions of the Constitution or its Amendments present focuses so particulary upon family law. Marriage and parenting are, a definition and custom, deeply associated with sex and sex roles. thus, no existing provision or amendment to the Constitution would have near the impact on state domestic relations laws as the proposed Equal Rights Amendment would.

IV. The Equal Rights Amendment, If Adopted, Would Equalize The Family Rights And Responsibilities of Men And Women.

It is reasonable to conclude that the impact of the adoption of the ERA on many family laws and doctrines (indeed, probably on most family laws and doctrines) would not be profound because the policies and practices of existing family laws could be continued without significant alteration by merely substituting gender-neutral statutory language and by clarifying a previously-unarticulated intention that particular legal rights or duties apply equally to men and women.

It is clear that the debate over the Equal Rights Amendment has served as a catalyst for state legislative reforms in the area of family laws, some of which are long overdue.[68] and if the Equal Rights Amendment were adopted, if would go far to insure the ultimate equality of men and women before the law with respect to their family rights and responsibilities. It would have a very beneficial effect of encouraging men to be responsible fathers, and husbands; would give divorced men greater encouragement and responsibility for their shildren; it would remove barriers to opportunities outside the home for married women and mothers; and it would encourage self sufficiency and independence. All of these results would be laudable.

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[68] W. Wadlington, & M. Poulsen, Domestic Relations 27 (Third Ed. 1978).

Thus, if it were adopted the Equal Rights Amendment would continue the trend already begun of breaking down coersive sterotypes. Of course, these changes have occurred over the last decade in many states even though the ERA has not been adopted; and such progressive changes have occurred in many states which do not have state ERAs.[69]

V. Adoption of the ERA Would Impair The Legal Rights of Men and Women Who Assume Traditional Family Responsibilities.

The outcome of challenges brought under the ERA to several significant rules and doctrines of existing family law can be reasonably predicted and could be expected to require significant changes in family laws and in public policies regarding families and family relations. The experience of the states that have enacted their own Equal Rights Amendments and the abundant commentary by lawyers and legal scholars provide a preview of how the courts might be expected to rule on particular issues if the ERA were adopted. And in a few areas it appears that provocative and far-reaching changes in family law and policy would be imposed if the Equal Rights Amendment were adopted.

(A) Marriage Laws.

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[69] H. Kay, supra note 1, at 318, 319.

> State which have not ratified the ERA have neither been calloused or insensitive to women's rights. Rather they have chosen an alternative approach to protecting those rights, which has succeeded in combating sex discrimination without mandating an absolutist approach regarding sex distinctions . . . .

Id. at 318 (citing Greenman, Studies in Family Law, Women's Rights and the State Legislatures (1980).

Commentators appear to agree that the ERA would require states to abolish gender-based distinctions in marital age requirements.[70] Legislatures "would have to set a single age for men and women" to marry.[71] At least ten states have statutes which rpvoide that, in limited circumstances, girls can marry (usually with parental approval) at a younger age than boys.[72] It is doubtful that most legislative supporters of the ERA actually intend to require states to permit homosexual marriages, and a Washington state court has ruled that its state ERA does not require recognition of homosexual marriage.[73] But the argument for mandating homosexual marriage emphasizes the strong [illegible]islative intent that under the ERA sex discrimination be treated the same as race discrimination, and laws requiring (or prohibiting) same-race marriages are clearly unconstitutional.[74]

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[70] B. Brown, A. Freedman, H. Hatz & A Price, supra note 1, at 101; United Comm'n on Civil Rights, supra note 1, at 10; Katz, supra note 1, at 127.

[71] Brown, Emerson, Falk & Freedman, supra note 1, at 939.

[72] Wardle, Rethinking Marital Age Restrictions, 22 J. Family L. (1983).
It is simply not clear whether states would be required to permit homosexual marriages if the Equal Rights Amendment were adopted.
Compare Note, The Legality of Homosexual Marriage, 82 Yale L.J. 573, 588 (1973) and Katz supra note 1, at 115-123 with A. Bingaman, supra note 1, at 176.

[73] R. Lee, supra note 1, at 64, 65; M. Childs, supra note 1, at 87-89; Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

[74] Loving v. Virginia, 388 U.S. 1 (1967); Rivera, Our Strait-

(Footnote 74 continued on next page)

It seems clear that the Equal Rights Amendment would require courts to give women the same right to sue for loss of consortium as a man enjoys. This has been a consistent result of the cases brought under the state ERAs.[78] And this is the consistent trend in states without state ERA's also, so this would not be a significant change.

It is also reasonably clear that states would have to impose the same obligation of spousal support on wives as are opposed on husbands. And this is currently the trend of the law. However, it would be a significant change if the role that a husband is primarily liable for support, and the wife is only secondarily liable, were abolished, and this appears to be one of the probable consequences if the EF[illegible] is adopted.[79] It is likely that the ERA would have a very significant impact upon laws governing the acquisition and control of marital property. It is clear that laws that vest management in control of property exclusively in the husband are unconstitutional.[80] But many commentators insist that even legal presmptions that the management of a property is vested the husband would violate the ERA.[81] More importantly, it is likely that the ERA would require a major revision in interfamily property laws in virtually every state.[82] It has been argued that the ERA would require all states to adopt a community property system or something close to it.[83] For years after passage of the ERA disgruntled litigants, and it is well known that family disputes produce an abundance of disgruntled litigants, would be able to make the colorable claim that the rule of domestic relations law applied in their cases violated the equal rights amendment. Divorce courts, family courts, probate courts, and general trial courts in every county and state in the nation would be called upon to apply the ERA to local family laws.

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[78] See *supra*, note ____. *See also* Annot., 90 ALR 3d at 195, 196.

[79] Bingaman, *supra* note 1, at 121; *See also*, Brown, Emmerson, Falk & Freedman, *supra* note 1, at 945, 946.

[80] Kirchberg v. Feenstra, 101 S.Ct. 1196 (1981).

[81] See generally, Bingaman, *supra* note ____, at ____; United Comm'n on Civil Rights, *supra* note 1, at 9, 10.

(C) Spousal Rights and Responsibilities After Death Or Dissolution.

If the Equal Rights Amendment were adopted, it is likely to have three significant impacts upon laws governing the relations of spouses after death or dissolution.[84] First, consistent with

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[82] Ryman, supra note 1, at 510, 511.

[83] Weitzman, supra note 1, at 202; See also, Bingaman, supra note 1, at 124.

[84] It is likely that the ERA would have many less significant impacts. For instance, it would ensure the right of divorced women to a restoration of their maiden name after divorce. H. Clark, supra note 1, at 1110. But this appears to be the common practice at the present time. Likewise, it would require that alimony be equally available to both men and women which is also currently required under the fourteenth amendment. Orr v. Orr ____ U.S. ____ (1978). It is also likely that under the ERA courts deciding questions of spousal support upon divorce would have to consider the facts of each case much more carefully since their ability

(Footnote 84 continued on next page)

To date, not a single state permits homosexual marriages. Thus, if laws permiting only hereosexual marriage were scrutinized under near-absolute standard of review, the ERA could have a revolutionary impact on the fundamental concept of marriage itself in every state.

(B) Rights and Responsibilities of Spouses.

It seems reasonably clear that laws requiring a married women to assume the surname of her husband would be unconstitutional under the Equal Rights Amendment. Moreover, many commentators argue that it would violate the ERA for the law to presume that a married woman assumes the name of her husband.[75]

It is equally clear that laws requiring women to assume the domicile of their husband would be unconstitutional under the Equal Rights Amendment.[76] Arguably, it would even be impermissible for states to presume that a married woman has the same domicile as her husband.[77]

(Footnote 74 continued from previous page)
Laced Judges: A Legal Position of Homosexual Persons in the United States, 30 Hastings L. J. 799, 874-878 (1979).

[75] "The Equal Rights Amendments would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage." Brown, Emmerson, Falk & Freedman, supra note 1, at 940. See also B. Brown, A. Freedman, H. Katz & A. Price, supra note 1, at 105; Note, 12 J. Fam. L. at 157; Weitzman, supra note 1, at 205. But see, R. Lee, supra note 1, at 73.

[76] Weitzman, supra note 1, at 200; Note, 12 J. Fam. L. at 157; R. Lee, supra note 1, at 71.

[77] Brown, Emmerson, Falk & Freedman, supra note 1, at 941.

the notion that rights acquired in property during marriage must be shared equally by husbands and wives, it is likely that laws in the eight or so common law states which have traditional dower or curtesy property schemes in which the right to a survivor's share or the amount differs between husbands and wives would be held to violate the ERA.[85] Likewise laws which give widowers but not widows a nonbarrable share of the husband's estate would probable be held to violate the Equal Rights Amendment.[86]

Second, it is likely that alimony and spousal maintenance schemes would have to eliminate entirely sex and sex-role distinctions. Not only would alimony have to be available equally for husbands and wives, but all laws, including legal presumptions, concering spousal support and maintenance would have to be sex-neutral. Thus, it is even possible that informal presumptions about the amount of support which a divorced woman is entitled to receive from her ex-husband would be found to be unconstitutional.[87] It is even possible that existing spousal support orders would have to be reviewed if they were based on

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(Footnote 84 continued from previous page)
to rely upon presumptions would be significantly reduced. This is a laudable goal, and is consistent with the trend of cases in recent years.

[85] B. Brown, A. Freedman, H. Katz & A. Price, supra note 1, at 180.

[86] Brown, Emmerson, Falk & Freedman, supra note 1, at 948.

[87] Avern & Greene, supra note 1, at 403-5.

impermissible sex-stereo types at the time they were entered.[88] It has also been suggested, and seems reasonable, that the ERA might prohibit states from considering fault as a factor in determining alimony, if it could be shown that that operates to the detriment of women more often than men.[89]

Third, it is possible that some tax exemptions and extending special favortism to widows dissipating in government programs would violate the Equal Rights Amendment.[90]

It has also been argued that the Equal Rights Amendment would require divorce to be available on the same grounds to men and women. As a practical matter, this would have little impact, even if it were true, in most states because most states have adopted no-fault divorce grounds either in lieu of or in addition to traditional fault grounds. However, with two particular grounds for divorce, this presents an interesting conceptual dilemma, even if it is practically insignificant. A woman's refusal to follow her husband to his new residence was deemed desertion or abandonment. If the mere presumption that a married woman's domicile is that of her husband violates the Equal Rights Amendment, then this ground for divorce would be unconstitutional because it is predicated on the forbidden presumption that the

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88. R. Lee, supra note 1, at 70.

89. B. Brown, A. Freedman, H. Katz, & A. Price, supra note _____, at 136.

90. [GET CITE]; R. Lee, supra note 1, at 72.

husband establishes the domicile of the family.[91] It is also been suggested that the traditional role that a man could have a marriage annulled if his wife were pregnant by another man at the time of the marriage would violate the Equal Rights Amendment unless a woman could have her marriage annulled if her husband had impregnanted another woman.[92] But this overlooks the fact that the disability for which an annullment is granted is not the sexual misconduct by the woman, but her inability at the time of marriage to perform the function going to the essentials of the marriage relationship, i.e., to conceive and bear children for her husband exclusively during the existence of the marriage. So this traditional ground for annullment probably comes within the "unique physical characteristic" exception to the absolute prohibition of sex discrimination.

(D) Parenting, Paternity, Adoption & Abortion.

Laws governing the creation of parent-child relations would likely be impacted by adoption of the Equal Rights Amendment in three significant ways. First, adoption laws which allow a child born out of wedlock to be released for adoption by his or her unwed mother which do not provide equal opportunity to the unwed father would probably be held to violate the ERA. It is not clear that the unwed father must be given the identical rights, i.e., that he be allowed to release his illegitimate child for

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91. Brown, Emmerson, Falk & Freedman, supra note 1, at 942.

92. Id. at 951; B. Brown, A. Freedman, H. Katz, & A. Price, supra note 1, at 184.

adoption without consent of the mother, but it is likely that states would have to require mothers of children born out of wedlock to give the father of the child greater opportunity to block the adoption of their newborn infants than they now do.[93]

Second, under one state Equal Rights Amendment it has been held that the courts must allow claims to be asserted by third party men that children born while a woman is married to another man are their own children.[94]

The logic of this position is that the biological father of a child has just as much claim to paternity as the biological mother, even if the biological mother is married to another man. If this were to become the general rule, it could have a significant impact in the many states where courts will not allow a party outside the family to challenge the assumption that the child born during a marriage is the child of the mother's husband.

It is unclear what effect the ERA would have upon laws restricting sexual behavior. A significant minority of the Supreme Court took the position that statutory rape laws are unconstitutional under the fourteenth equal protection standard.[95]

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[93] See e.g., In re Adoption of Walker, 368 A.2d 603 (Pa. 1976); Lehr v. Robinson, 103 S.Ct. 28, 2985 (1983); Caban v. Mohammed, 441 U.S. 380 (1979). See Weitzman, supra note 1, at 177.

[94] R. McGee v. J. W., 200 Colo. 345, 615 P.2d 666 (1980).

[95] Michal M. v. Superior Court, 450 U.S. 464 (1981) (upholding sex-age discrimination in California statutory rape law).

Since the Equal Rights Amendment would impose a significantly more exacting standard of judicial review, it is not certain whether statutory rape laws, which penalize sexual intercourse with girls, but not boys, under a certain age, would be upheld.[96] Likewise, laws imposing greater punishment upon fathers for having incest with their daughters and upon mothers having incent with their sons would be in a tenuous position were the ERA to be adopted. Before the Illinois Supreme Court summarily ruled that such discrimination did not violate the state ERA, the Illinois Court of Appeals had twice held that such statutes were unconstitutional.[97] However, laws prohibiting forcible rape would appear to be safe.[98] And to the extent that abortion policy does not come within the "unique physical characteristics" qualification, the fact that public policies favoring childbirth over abortion impact women only, at least during the gestation period, could mandate the state taking a position of greater

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96. [GET CITE]; R. Lee, supra note 1, at 64.

97. People v. Yocum, 31 Ill. App. 3d 586, 335 N.E.2d 183 (1975); People v. Boyer, 24 Ill. App. 3d 671, 321 N.E.2d 312 (1974), Rev'd, 63 Ill. 2d 433, 349 N.E.2d 50 (1976).

98. See, Comm'n. on Civil Rights, supra note 1, at 24; [GET CITE].

Adoption of the ERA would also have a significant impact on the public funding of abortion and the public policy regarding abortion. One state court has already held that a state ERA prohibits states to fund child birth services but not abortion services.
Fischer v. Commonwealth, 10283 CP 1981 (Commoh. Ct. Pa. Feb. 7, 1984).

neutrality on abortion.[99] It is likely that adoption of the ERA would have many other effects on laws governing the creation of parent child relationships which would not differ significantly from current law or trends. For instance, statutes of limitations on paternity actions which unduly restrict the right of unwed fathers to establish paternity would be unconstitutional.[100] It would surely be argued that the statute requires states to permit abortion on demand, but that is already the law.[101]

(E) Laws Governing Parent-Child Relations.

One potentially significant change concerns the names of children. It is reasonably clear that laws requiring a child to take the same name as his or her father would be unconstitutional.[102] But it also appears that even mere presumptions that a child assumes the surname of his or her father at birth or during minority would be declared unconstitutional.[103]

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[99] The United States Supreme Court has already required states to take a largely neutral position in their policies regarding abortion. *See*, Akron Center for Reproductive Health, Inc., v. City of Akron, ____ U.S. _____ (1983).

[100] *See*, B. Brown, A Freedman, H. Katz & A. Price, *supra* note 1, at 192; In re Interest of Miller, 605 S.W.2d 332 (Tex. Civ. App. 1980), *aff'd*, 631 S.W.2d (730 1981); Pickett v. Brown, 103 S.Ct. 2199 (1983); Mills v. Habuetzel, 456 U.S. 91 (1982).

[101] Roe v. Wade, 410 U.S. 113 (1973).

[102] Brown, Emmerson, Falk, & Freedman, *supra* note 1, at 941.

Adoption of the ERA would have a similar impact on laws governing the domicile of the child. The traditional rule of laws that a child assumes the same domicile as his or her father or custodian. That would fall under the Equal Rights Amendment. In fact, it appears that the ERA would abolish even the presumption that a child has the same domicile as his or her father.[104]

Second, it is clear that "[t]he Equal Rights Amendment requires that all laws concerning child support be sex-neutral."[105] Thus, "once the identity of the father has been ascertained, the rights and obligations and the parent-child relationship must be the same for both the father and the mother.[106] Most states do not disagree with the general proposition that both mothers and fathers must be responsible for the financial support of their

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103. [T]he equal rights amendment prohibits rules governing the naming of a child at birth that favor the surname of one parent or grant decision-making power concerning names to only one sex. Additionally, the ERA requires the elimination of any rule arbitrarily favoring the continued use of the father's or the mother's name for the children throughout their minority. B. Brown, A. Freedman, H. Katz & A. Price, supra note 1, at 109.

104. Brown, Emmerson, Falk & Freedman, supra note 1, at 942; R. Lee, supra note 1, at 71; B. Brown, A. Freedman, H. Katz & A. Price, supra note 1, at 116.

105. Id. at 156.

106. Id. at 192.

children. But in many states the law establishes that the father has the primary duty of support, and that the mother is only liable to the extent that the father is unable to provide that support. These laws would be unconstitutional if the ERA were adopted.[107]

Additionally, it is possible that the Equal Rights Amendment could require states to disregard any distinctions between the benefits and grants available to married and unmarried mothers and fathers. If so this would have a very significant impact upon existing social programs.[108] It could be argued that such laws discriminate in government programs because the benefit is dependent upon the applicant's relationship with the person of the opposite sex.

(F) Laws Affecting Parent-Child Relations After Death or Divorce.

Adoption of the Equal Rights Amendment would have two very profound effects upon post-divorce parent-child relations. The first would be abolition of the tender years doctrine. "The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent."[109] At present, the sex of the parent is not a major factor in child custody disputes because old rules that made it very difficult for a father to obtain custody of young children have largely been repudiated.[110] Nevertheless, it is fair to say that sex is a factor in some cases because many states allow judges to presume that the relationship between a mother and a young child is particularly important. Thus, many states still give the mother a "benefit of the doubt" in custody disputes when all other factors are about equal. But even this modest presumption would be abolished.[111] Thus, if it were statistically shown that mothers continued to be awarded custody in disproportionately large number of contested cases, a defacto violation of the ERA might exist.[112]

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[107] Note, supra note 1, at 155.

[108] Califano v. Boles, 443 U.S. 282 (1979).

[109] Brown, Emmerson, Falk, & Freedman, supra note 1, at 953.

A second major change would be on child support. "The ERA requires that all laws concerning child support be sex-neutral."[113] This does not mean that mathematically equal division would be required (although it is certain that some support-obligated men would so argue), and it seems clear that courts would have to take into account the economic value of non-economic services rendered by the wife, e.g., child care, teaching children, etc. But a major and controversial consequence of adoption of the ERA is the strong likelihood that mothers who had marketable job skills would be required to leave the home and return to work earlier than they would if the ERA were not enacted. Two lower courts in Pennsylvania reached that decision and, although they were subsequently reversed by divided appellate courts, the defacto as well as de jure impact of the ERA to cause mothers to leave home to support their children would constitute a very radical change from existing family law policy.[114] Finally, in awarding child custody, it might violate the ERA for courts to consider homosexual relations of the parent. That is, for the same reasons that it might violate the ERA to prohibit same-sex marriages, it might violate the ERA for courts to presume that it is detrimental for a child to be raised by a practicing homosexual.[115]

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[110] [GET CITE]

[111] Id; B. Brown, A. Freedman, H. Katz & A. Price, supra note 1, at 188; Kurtz, supra note 1, at 142.

[112] See, In re Marriage of Franks, 542 P.2d 845 (Colo. 1975); Mememme v. Mememme, 572 P.2d 473 (Colo. 1977). In Franks, the court rejected such an argument on the basis that the statistics which showed that women were awarded custody in a disproportionate number of cases did not show that the husbands in those cases had contested or sought custody. The negative pregnant in this basis of repudiating the sex-discrimination claim is that if a man could show that state courts are awarding mothers custody in a greater number of contested cases, it would violate the ERA.

[113] B. Brown, A. Freedman, H. Katz & A. Price, supra note 1, at 156.

@ If the equal rights amendment were enacted it would significant impair laws and policies which support women who assume traditional roles as wives and mothers.

While the precise impact of the Equal Rights Amendment, if adopted, upon many family law issues is very debatable, the overall systematic impact is very clear. In the words of

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[114] See infra note _____ and accompanying text.

[115] See supra note _____ and accompanying text.

Professor Herma Hill Kay: "Will ratification of the equal rights amendment require fundamental changes in traditional family life? Paradoxically, both opponents and proponents agree that it would."[116] Adoption of the ERA would require "massive rewriting of domestic relations laws" in every state.[117] One Professor wrote that the ERA would necessitate a "culture revolution of proportions beyond the ken of the proponents," which would "minimize legal reinforcement of culture mores supportive of family life, tend to downgrade the homemaker role, and mandate a unisex family law policy.[118] The ERA embodies notions about family rights and responsibilities which, in particular cases run "counter to traditional roles of men and women and to traditional perspectives on marriage."[119] And the Maryland high court held that the state ERA "was intended to, and did, drastically alter traditional views of the validity of sex-based classifications."[120] [INSERT **** W]

The overall impact of the adoption of the ERA would be to abolish laws which are differential to mothers and wives and which provide preferential treatment to women who care for children.[121]

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[116] H. Kay, supra note 1, at 315, 316; Id. at 319.

[117] O. Hatch, supra note 1, at 37; United States Comm'n On Civil Rights, supra note 1, at 24; Elesen, Coogan, & Ginsberg, supra note 1, at 1076.

[118] Ryman, supra note 1, at 514.

[119] W. Weyrauch & S. Katz, supra note 1, at 282.

[120] Rand v. Rand, 374 A.2d 900 (Md. 1977).

[121] The legal defference to mothers comes from a time when our country was young, needed population, and wanted to encourage women to have many children. This may have been appropriate for that period in our history. But what about our present need for a zero population growth? . . . [U]ntil recently, women would seldom express a dislike for children or say that they did not want to have children. Today, however, a real choice is open to women . . . .

> Once again, the law seems to be based on stereotyped assumptions about the proper roles of men and women. . . . Certain public policy would be better served by eliminating these rigid role prescriptions and increasing the options available to both sexes.

Weitzman, supra note 1, at 195. See also, Elsen, Coogan, & Ginsberg, supra note 1, at 1076.

The problem is that the ERA, if adopted, would not only prohibit laws which coerce women into particular roles, but it would also prohibit incentives. It would abolish modest, rebuttable presumptions as well as abosolute, rigid rules. Under a semi-absolute standard of review, the ERA would not allow judges to acknowledge the distinction that exists between requirement and preference; if any legal doctrine, whether absolute or flexible, contains a discriminatory element, it would be subject to rigid judicial scrutiny.

Thus, as we have seen, it is likely that adoption of the ERA would abolish even mere rebuttable presumptions (not hard and fast requirements) that married women assume the surname of their husbands, tha married women have the same domicile as their husbands, that children take the domicile and surname of their fathers, that the husband and father is the primary provider of financial support for his family, and that, if all objective factors regarding the ability of contesting parents to raise a child are about equal, the benefit of the doubt the should be given to the mother if the child is an infant.

Moreover, it is clear that

> Laws, including family property rights laws creating benefits for women who prefer the homemaker role--a non-economic career-- . . . are probably within prohibition of proposed Amendment. . . [T]he economic system [thus] may force more women out of homemaker roles, necessitate child care by the community rather than the family, and increase urban-rural life-style differences.[122]

Thus, the ultimate impact of the ERA would not be to breakdown stero-types about sex roles, but throw out traditional notions about family responsibilities and substitute a new sterotype about unisex spousal and parental responsibilities This is why, if the ERA were adopted, people who favor adult single independence, small families or no families, and two income families, might rejoice, while persons with traditional notions about the value of marriage and families would fear for the institutions and relationships they cherish.

There is no doubt that current family policy in both the states and in the federal government provides an incentive for women to assume mothering roles and responsibilities. Many people believe that the contribution which a mother makes by staying at home is so beneficial to children, families, and to society in general, that women who choose to forgo other opportunities ought to be encouraged with special incentives and support with special benefits. These incentives, benefits and assumptions, mild as they are, nevertheless constitute a form of sex discrimination that would be threatened if the ERA were enacted. The authorities I have reviewed appear very solidly to support the conclusion that family laws and policies which encouraged women to stay at home to raise their children by extending to them benefits, exemptions, and legal presumptions that were not extended equally to fathers would be prohibited.

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[122] Ryman, supra note 1, at 511.

The "tender years" doctrine is a good example of this. There is not one "tender years" doctrine, but really three doctrines. All are based on the assumption that the bonding relationship between mother and a young child is so important to the well being and development of the child that the law should encourage it. The oldest "tender years" doctrine was very strict. It consisted of a rule that, in custody contests, the mother of a child of tender years was to be awarded custody unless the father could show that she was absolutely unfit. A second "tender years" doctrine provides that the mother will be awarded custody unless the father shows, by substantial or compelling evidence, that he would be a better custodian for the particular child. The third, and most widely used form of the "tender years" doctrine, is a mere tie-breaker presumption that if all other factors are equal, the mother of a young child will be given the benefit of the doubt in custody. Regrettably, it is quite likely that all three forms of this preference for mothers would be held to violate the ERA. Indeed, it would appear that all of them are based upon the assumption which the ERA would prohibit from being expressed in any way in law.

Senator **Hatch**. Thank you, Professor.

Ms. Levick, We are happy to turn to you.

STATEMENT OF MARSHA LEVICK

Ms. **Levick**. Thank you, Senator Hatch.

I welcome the opportunity to appear before you today to discuss the many ways in which the proposed Federal equal rights amendment will require modification and reform of current American family law in terms which will be of lasting benefit to both men and women in our society.

Before proceeding to my prepared comments, I would like to at least address one comment that Professor Wardle has expressed. I am sure that I will have an opportunity during the course of the hearing to respond to many of his other points.

But I am somewhat, I guess, struck by a certain irony in his reference to the fact that he has been led to believe that it is homemakers across America who make up one of the strongest groups in opposition to the equal rights amendment.

I say that I find it somewhat ironic because it has always been our view that the application and interpretation of the equal rights amendment would, in fact, provide greater benefit to the homemakers of America and accord them greater equality and fuller status than they have been accorded under our existing system of family laws.

It is to these women that many of the efforts of the equal rights amendment is addressed and it is to these women for whom we see the greatest benefit.

It is particularly interesting to talk about the issue of family law and the equal right amendment at a time when there is so much poverty facing American women. It is unquestionable and I know that this has been documented in other hearings before this committee and in other hearings before both the Senate and the House that the degree of poverty facing women in America today is very much tied to the discriminatory ways in which our family laws have been applied to women in the past as well as other kinds of discrimination that women face in employment.

It is largely for this reason that I think it is critically important that we do look at the issue of the ERA and family law because, as I said, it is our belief that the ERA will do a great deal toward ameliorating many of the concerns and issues that Professor Wardle has raised.

The American system of family law is, indeed, rooted in sex-based distinctions and stereotypes which have historically governed the allocation of rights and responsibilities within the family. It has increasingly come under attack in recent years largely for this reason. As one commentator has noted:

> The principles developed to protect marriage and family as an institution are the most sex discriminatory in all of law. When legal rights and duties are dependent upon the sex of the individual without regard to the relevance of sex to the object of these rights and duties, sex discrimination is being used unjustly as a legal tool

The basis for this disturbing phenomenon in domestic relations law derives from our adherence to the common-law notion of the unity of husband and wife, that is, the very being or legal existence of the woman is suspended during the marriage or at least incorporated or consolidated into that of the husband. The legacy of this commonlaw principle is evident in numerous discriminatory legal doctrines that formed the early basis of American family law.

Thus, for example, the notion that only wives were eligible for alimony at the time of divorce derives directly from the common-law principle that the husband was the sole wage earner, theoretically responsible for the support of his family, and the concept of alimony was really viewed simply as an extension of his obligation of support for the wife.

In return for his support, the husband had an absolute right to his wife's services, both inside and outside the home and to any economic benefits derived therefrom. Because wives were considered their husband's property, the law provided husbands with a variety of actions in tort to redress injury to the wife for loss of her services. Wives did not have a similar right to recover on behalf of their husbands. Such sex stereotyping also influenced the development of the rebuttal presumption in custody cases that favored the mother as custodian of the child. The presumption was based on the belief that women belonged in the home where they could exercise their presumed superior abilities as nurturers and caretakers.

With respect to marital property, married, whether homemakers or wage earner, were at a serious disadvantage. As Professor Krauskopf has noted, homemakers could not win. The common-law system is based on the assumption that the wife's place is in the home. Although it fosters the homemaker's as proper and necessary, the common law provides no economic reward for the wife's contribution to the family assets or for her lost opportunity to develop earning power outside the home. The system ignores the fact that the wife's entire economic worth is absorbed into the marital unit.

One distressing consequence of this system has been that any award of marital property to the homemaker wife of divorce often was viewed by her husband and the court as a gift to her, rather than tangible recognition of her ownership rights earned by virtue of her contribution of homemaking services.

Wage earning wives fared little better under the common-law system. In title States, a woman with her own income or assets could make a financial contribution to the acquisition of marital property only to discover at the time of divorce that her husband was considered the sole owner of the property because it was actually titled in his name, and often title was placed in the husband's name simply because this was the customary way to proceed. Because some courts did not have statutory authority to transfer title property between spouses, this harsh regime was enforced even against a wife who could prove legally the nature and extent of her financial contribution.

The common-law unity of husband and wife as first articulated by Blackstone has, of course, at least in principle, been largely rejected by many of the States in this country. In practice, however, we see its effect continually in court decisions interpreting contemporary domestic relations law in ways that perpetuate the undervaluing of a woman's contribution as a homemaker and which ignore the changing realities of the roles of both men and women in the American family today.

These changing realities, we believe, increasingly dictate that we adopt a view of marriage not as a mythical unity in which the rights of one party are submerged into the rights of another but rather as an economic and social partnership of equals. In this model, each partner makes contributions of commensurate value to the marital community regardless of the forms of the contributions and decisions regarding finances, property, education, roles, and children are made jointly by each spouse and with each of their needs and aspirations taken into account.

While examples of legislative and judicial developments incorporating this changing view of the American family can be found both in the adoption of equitable distribution laws and community property schemes around the country as well as such model legislation as the Uniform Marriage and Divorce Act, one of the most important sources of support for this emerging analysis of the marital relationship as a partnership among equals has been found in the State equal rights amendment provisions which exist in 16 States in this country.

In considering the impact of a Federal ERA on our current system of family law, we are thus extremely fortunate to have the experience and benefit of many of these States which have already addressed the application of the equality principle rooted in the ERA to the system of domestic relations law. Some of the examples of the ways in which State ERA's have forced a modification of traditional family law will help to illuminate the enormous importance of a Federal ERA to the ultimate achievement of such equality for women and men across America.

I would also like to add here in reference to an additional comment that Professor Wardle made regarding the enormous amount of litigation that an equal rights amemdment would spur in the area of domestic relations law.

It has been our experience in looking at the combined experience of those States which have passed State equal rights amendments that exactly the contrary has occurred. Most of these States have taken the opportunity, following the passage of their amendments, to voluntarily review their own statutes and to correct the kinds of discrimination and discriminatory provisions that many of these statutes contained.

The amount of litigation that has actually taken place in ERA States has been very little.

In the area of child support, State ERA's have been used to establish not only a mutual obligation of support by both parents but also to accord economic value to the custodial homemaker's nonmonetary contributions of child care and nurturing. Courts in Pennsylvania, Texas, Colorado, Maryland, and Washington have all recognized the value of the nonworking parent's custodial contribution and have begun to issue support awards in accordance with the respective abilities and capacities of each spouse to contribute. By recognizing that the custodial parent's nonmonetary contribution to the care and well-being of the child fulfills her obligations of support, these States have also avoided the artificial and rigid imposition of a duty of an equivalent financial contribution to the nonworking spouse. These rulings should also significantly enhance the economic well-being of the custodian parent by requiring that an award of comparable financial support be assessed against the working noncustodial parent.

It is important to underscore here that the concern that the passage of an equal rights amendment would force women out of the home and require them to accept paid employment in order to meet child support obligations and responsibilities has simply not happened in States with the experience in interpreting State equal rights amendments.

As I indicated, what these States have done is simply to recognize that the care and nurturing that the custodian parent provides to the children is, indeed, an equivalent measure and ability of that parent's responsibility to provide support for the child.

Sex-based alimony awards have also been struck down in the face of State equal rights amendments and have been replaced with more equitable schemes for assessing the obligation of support. In no State, however, has this resulted in an end to alimony. Instead, States have replaced existing inequitable laws with provisions that permit alimony to be awarded to the dependent spouse in a manner that is regardless of gender. Thus, the original purpose of alimony, to provide support for the dependent spouse which was usually the wife when the marriage disintegrated, was brought into the 20th century with the recognition that the dependent spouse could also, in some instances, be a husband.

At the same time however, State laws have imposed arbitrary maximum limits on the amount of support that a wife could get, in some cases from one-quarter to one-third, have also been invalidated as inherently discriminatory.

For example, in a Pennsylvania case in which a Pennsylvania court struck down a law in that State prohibiting judges from awarding the wife more than one-third of her husband's earnings, the Pennsylvania court condemned the rule for its adherence to, and I quote, "an ingrained sexist philosophy whereby a man's labor for money was thought to be more valuable than a woman's work as a homemaker."

The rules applied by courts in child custody decisions also have been affected by State ERA's. Originally at common law, a father had a virtually absolute right to custody which could be denied only where danger to the child or corruption of the father were proven. It was not until the 20th century that courts developed the tender years doctrine that has been mentioned earlier. It presumed the best interests of young children are served by awarding custody to the mother. Since the expressed goal was to determine ultimately what was the best interest for the child, however, in some cases the effect of this judicial presumption could operate to the detriment of the child.

Recognizing this weakness, the tender years doctrine has been rejected in recent years in most jurisdictions. Where the issue has been definitively addressed, State ERA jurisdictions have, either by statute or case law, discarded the doctrine. This has not, however, resulted by any means in the wholesale denial of custody awards to mothers who previously benefited from this presumption. To the contrary, State courts and legislatures have simply recognized that the tender years presumption is inconsistent with the principle of equality that is recognized and embodied in State equal rights amendments and opted in the alternative for an approach which affords each parent an equal right to custody with the award of custody ultimately being determined by the unique facts of each case.

Another example of the elimination of sex-based classifications concerns the issue of management rights over marital property. Changes in this area illustrate how ERA's promote the marriage partnership concept and have produced faster and more effective legal reform than has occurred under the Federal Constitution's equal protection clause.

Although community property is premised on the idea that husband and wife have equal ownership rights in all marital property, in the past, all eight community-property States had rules that gave the right to manage and control the property exclusively to husbands.

After adopting State ERA's in the early 1970's, the legislatures in New Mexico and Washington acted expeditiously to reappeal these sex-biased provisions and replace them with rules extending management rights equally to wives and husbands. A similar pattern can be seen in common-law property States which, of course, have typically assessed ownership in accordance with who held title. Under the Massachusetts ERA, the traditional husband-controlled tenancy by the entireties rule was modified to provide for equal management rights for wives and husbands in the marital property.

With regard to ownership of property acquired during the marriage, the courts have again considered and invalidated sex-based legal presumptions as violative of State ERA's. For example, Pennsylvania law contained a legal presumption that the husband was the owner of household goods even though the goods were used by both husband and wife. The wife had the burden of proving that she had contributed financially to the acquisition of the goods before she was permitted to assert any ownership claims. In most cases, this would be an extremely difficult burden for the wife to bear. Following ratification of the Pennsylvania ERA, the Pennsylvania Supreme Court, in *DiFlorido* v. *DiFlorido*, rejected the sex-based presumption and said:

> With the passage of the equal rights amendment, this court has striven to insure the equality of rights under the law and to eliminate sex as a basis for distinction. Since "the law will not impose different benefits on different burdens upon the members of a society based on the fact that they may be men or women" * * * we unhesitatingly discard the one-sided presumption confronted today.

The facts set forth in the *DiFlorido* case were a classic example of the inequities which this prior principle of law frequently visited upon women. It was a situation in which a woman had been married for 30 years and at the time of divorce was confronted with an analysis that would have deprived her of virtually all of the household goods as having been presumed to be in the custody and ownership of her husband.

The court went further in this case and replaced the husband ownership presumption with a joint-partnership approach that acknowledge the homemaker wife's contribution to the acquisition of the property providing services. In Virginia, the legislature also enacted a statute forbidding the use of a presumption that the husband was owner of all of the wife's personal property.

The recognition of the value of homemaker services that has been extended to women by the passage of State equal rights amendment provisions in the areas discussed above has also resulted in judicial and legislative recognition of the value of the homemaker contribution to the acquisition of marital property.

This has resulted in the new development of a new presumption of equal partnership and ownership in the marital assets requiring equal distribution of marital assets at the time of divorce, in the absence of relevant factors dictating an alternative and presumably more equitable result.

This doctrine has replaced the traditional sex-based presumption placing ownership of all marital property in the husband unless the wife could prove she had financially contributed to its acquisition. As it noted with regard to the rule limiting the amount of support that a wife could receive, the Pennsylvania Supreme Court likewise recognized the inherent sexism in a rule of law according no credit to the very real and substantial, though nonmonetary, contributions that homemakers offer both to the acquisition and upkeep of martial assets.

It is in this area of the law where we have really seen the greatest progress and the greatest potential for a Federal ERA in extending to women not only greater rights at the time of divorce but in the ways in which an equal rights amendment could do a great deal toward eliminating the enormous poverty and economic disadvantage that women suffer following divorce.

As can be seen from this discussion, families are a principal beneficiary of the equal guarantees provided by State equal rights amendments. The extension of legal rights and benefits to both women and men and the simultaneous removal of gender-based burdens and presumptions, triggered by these amendments, is producing a more equitable and responsive legal system governing

American family life. In this system, the needs, abilities, and contributions of each family member, rather than antiquated rules based on sex stereotypes, form the basis of these laws.

Where State ERA's have been implemented by courts and legislatures, they have provided faster, more comprehensive and more effective reform of laws pertaining to the family than has occurred in many States that do not have equal rights provisions. The ERA-inspired reforms have been effected through the systematic invalidation of discriminatory gender lines and by according meaningful legal recognition to the value of homemaker services. The successful use of the State provisions as law-reform tools highlights the need for the proposed Federal equal rights amendment which would provide the constitutional foundation to extend these equitable principles to all 50 States.

We therefore ask you once again to submit to the States for ratification the proposed equal rights amendment so that all men and women may share in its benefits.

Thank you.

[The prepared statement of Ms. Levick follows:]

STATEMENT OF
MARSHA LEVICK, LEGAL DIRECTOR
NOW LEGAL DEFENSE AND EDUCATION FUND

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE SENATE JUDICIARY COMMITTEE

CONCERNING THE IMPACT OF THE ERA UPON FAMILY LAW

JUNE 22, 1984

I am pleased to appear before you today to discuss the many ways in which the proposed Federal Equal Rights Amendment will require modification and reform of current American family law in terms which will be of lasting benefit to both men and women in our society.

The American system of family law, rooted in sex-based distinctions and stereotypes which have historically governed the allocation of rights and responsibilities within the family, has increasingly come under attack in recent years. As one commentator has noted,

> The principles developed to protect marriage and family as an institution are the most sex discriminatory in all of law. When legal rights and duties are dependent upon the sex of the individual without regard to the relevance of sex to the object of these rights and duties, sex discrimination is being used unjustly as a legal tool.[1]

The basis for this disturbing phenomenon in domestic relations law, which more than any other body of law looks almost exclusively to gender as a determination of rights and responsibilities, derives from our adherence to the common law notion of the unity of husband and wife -- "that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated or consolidated into that of the husband."[2] The legacy of this common law principle is evident in numerous discriminatory legal doctrines that formed the early basis of American family law.

Thus, for example, the notion that only wives were eligible for alimony at the time of divorce derives directly from the common law presumption that the husband was the sole wage earner, theoretically responsible for the support of his family, and that the concept of alimony was simply the extension of the husband's duty to support his wife.[3]

In return for his support, the husband had an absolute right to his wife's services, both inside and outside the home[4] and to any economic benefits derived therefrom. Because wives were considered their husbands' property, the law provided husbands with a variety of actions in tort to redress injury to the wife or the loss of her services. Wives did not have a similar right to recover on behalf of their husbands. Such sex stereotyping also influenced the development of the rebuttable presumption in custody cases that favored the mother as custodian of young children. This presumption was based on the belief that women belonged in the home where they could exercise their presumed superior abilities as nurturers and caretakers.[5]

With respect to marital property, married women -- whether homemakers or wage earners -- were at a serious disadvantage. As Professor Krauskopf has noted, homemakers could not win:

> The common law system is based on the assumption that the wife's place is in the home. Although it fosters the homemaker's role as proper and necessary, the common law provides no economic reward for the wife's contribution to the family assets or for her lost opportunity to develop earning power outside the home. The system ignores the fact that the wife's entire economic worth is absorbed into the marital unit.[6]

One distressing consequence of this system has been that any award of marital property to the homemaker wife at divorce often was viewed by her husband and the court as a gift to her, rather than tangible recognition of her ownership rights earned by virtue of her contribution of homemaking services.

Wage earning wives fared little better under the common law system. In title states, a woman with her own income or assets could make a financial contribution toward the acquisition of marital property, only to discover at the time of divorce that her husband was considered sole owner of the property because it was titled in his name. Often, title was placed in the husband's name for no better reason than that it was customary to do so.[7] Because some courts did not have statutory authority to transfer titled property between spouses, this harsh regime was enforced even against a wife who could prove legally the nature and extent of her contribution.[8]

The common law unity of husband and wife as first articulated by Blackstone has of course, in principle, been widely rejected. In practice, however, its lingering effect is continually evident in court decisions interpreting contemporary domestic relations law in ways that perpetuate the undervaluing of a woman's contribution as a homemaker, and which ignore the changing realities of the roles of both men and women in the American family, and in the workplace.

These changing realities, however, increasingly dictate that we adopt a view of marriage not as a mythical unity in which the rights of one party are submerged into those of the other, but as an economic and social partnership of equals. In this model, each partner makes contributions of commensurate value to the marital community, regardless of the forms of contribution, and decisions regarding finances, property, education, roles, and children are made jointly by each spouse, and with each of their needs and aspirations taken into account.

While examples of legislative and judicial developments incorporating this changing view of the American family can be found in both the adoption of community property schemes and such model legislation as the Uniform Marriage and Divorce Act, one of the most important sources of support for this emerging analysis of the marital relationship as a partnership of equals has been supplied by state Equal Rights Amendments. In considering the impact of a federal ERA on our current system of family law we are thus extremely fortunate to have the benefit of the experience of many of these states which have already addressed the application of the equality principle rooted in the ERA to this body of law. Some examples of the ways in which state ERA's have forced a modification of traditional family law will thus help to illuminate the enormous importance of a federal ERA to the ultimate achievement of such equality for all women, across America.

In the area of child support, state ERA's have been used to establish not only a mutual obligation of support by both parents, but also to accord economic value to the custodial homemaker's non-monetary contributions of child care and nurturing. Courts in Pennsylvania, Colorado, Texas, Maryland and Washington have all recognized the value of the non-working parent's custodial contribution, and have begun to issue support awards in accordance with the respective abilities and capacities of each spouse contribute.[9] By recognizing that the custodial parent's non-monetary contribution to the care and well-being of the child fulfills her obligations of support, these states have also avoided the artificial and rigid imposition of a duty of an equivalent financial contribution on the non-working spouse. These rulings should significantly enhance the economic well-being of the custodial parent by requiring that an award of comparable financial support be assessed against the working, non-custodial parent.

Sex-based alimony awards have also been struck down in the face of state Equal Rights Amendments, and been replaced with more equitable schemes for assessing the obligation of support. In no state has this resulted in an end to alimony. Instead, states have replaced existing inequitable laws with provisions that permit alimony to be awarded to the dependent spouse in a marriage regardless of gender. Thus, the original purpose of alimony -- to provide support for the dependent spouse (usually the wife) when the marriage disintegrated -- was brought into the twentieth century with the recognition that the dependent spouse can also be a husband.[10]

At the same time however, state laws imposing arbitrary limits on the amount of support a woman could be awarded have also been invalidated as inherently discriminatory. In striking down a Pennsylvania law prohibiting judges from awarding a wife more than 1/3 of her husband's earnings, the Pennsylvania court condemned the rule for its adherence to "an ingrained sexist philosophy whereby a man's labor for money was thought to be more valuable than a woman's work as a homemaker.[11]

The rules applied by courts in child custody decisions also have been affected by state ERAs. Originally at common law, a father had a virtually absolute right to custody, which could be denied only where danger to the child or corruption of the father were proven. It was not until the twentieth century that courts developed the tender years doctrine that presumed that the best interests of young children are served by awarding custody to the mother.[12] Since the expressed goal was to determine what was best for the child, in some cases the effect of the judicial presumption might operate to the detriment of the child. Recognizing this weakness, the tender years doctrine has been rejected in recent years in most jurisdictions. Where the issue has been definitively addressed, state ERA jurisdictions have, either by statute or case law, discarded the doctrine.[13] This has not, however, resulted in wholesale denials of custody to the mothers who previously benefitted from the tender years presumption. To the contrary, state courts and legislatures have simply recognized that the tender years presumption is inconsistent with the principle of equality embodied in state equal rights provisions and opted, in the alternative, for an approach which accords each parent an equal right to custody with the award of custody ultimately being determined by the unique facts of each case.

Another example of the elimination of sex-based classifications concerns the issue of management rights over marital property. Changes in this area illustrate how state ERAs promote the marriage partnership concept and have produced faster and more effective legal reform than has occurred under the federal constitution's Equal Protection Clause.

Although community property is premised on the idea that husband and wife have equal ownership rights in all marital property, in the past, all eight community property states had rules that gave the right to manage and control the property exclusively to husbands.[14]

After adopting state ERAs in the early 1970's, the legislatures in New Mexico and Washington acted expeditiously to repeal these sex-biased provisions and replace them with rules extending management rights equally to wives and husbands. A similar pattern can be seen in common law property states. Under the Massachusetts ERA, the traditional husband-controlled tenancy by the entireties rule was modified to provide for equal management rights for wives and husbands in the marital property.[15]

Similarly, with regard to ownership of property acquired during the marriage, courts again have considered and invalidated sex-based legal presumptions as violative of the state ERAs.

For example, Pennsylvania law contained a legal presumption that the husband was the owner of household goods even though the goods were used by both husband and wife. The wife had the burden of proving that she had contributed financially to the acquisition of the goods before she was permitted to assert any ownership claims. She could rarely, if ever, sustain this burden. Following ratification of the Pennsylvania ERA, the Pennsylvania Supreme Court in DiFlorido v. DiFlorido[16] rejected this sex-based presumption:

> With the passage of the Equal Rights Amendment, this court has striven to insure the equality of rights under the law and to eliminate sex as a basis for distinction. Since "the law will not impose different benefits or different burdents upon the members of a society based on the fact that they may be men or women" ... we unhesitatingly discard the one-sided presumption confronted today.

The court went further and replaced the husband-ownership presumption with a joint partnership approach that acknowledged the homemaker wife's contribution to the acquisition of the property providing services. In Virginia, the legislature enacted a statute forbidding the use of a presumption that the husband was owner of all his wife's personal property.[17]

The recognition of the value of homemaker services that has been extended to women by the passage of state equal rights provisions in the areas discussed above has also resulted in judicial and legislative recognition of the value of the homemaker contribution to the acquisition of marital property. This has resulted in the development of a new presumption of equal partnership -- and ownership -- in the marital assets requiring equal distribution of marital assets at the time of divorce, in the absence of relevant factors dictating an alternative --and presumably more equitable--result.[18] This doctrine has replaced the traditional sex-based presumption placing ownership of all marital property in the husband unless the wife could prove that she had financially contributed to the acquisition of the property. As it noted with regard to the rule limiting the amount of support a wife could receive, the Pennsylvania Supreme Court likewise recognized the inherent sexism in a rule of law according no credit to the very real and substantial, though non-monetary, contributions that homemakers offer both to the acquisition, and upkeep, of marital assets.[19]

As can be seen fromthis discussion, families are a principal beneficiary of the equal guarantees provided by state equal rights amendments. The extension of legal rights and benefits to both women and men, and the simultaneous removal of gender-based burdens and presumptions, triggered by these amendments is producing a more equitable and responsive legal system governing American family life. In this system, the needs, abilities and contributions of each family member, rather than antiquated rules based on sex stereotypes, form the basis of the law.

Where state ERAs have been implemented by courts and legislatures they have provided faster, more comprehensive and more effective reform of laws pertaining to the family than has occurred in many states that do not have equal rights provisions in their constitutions. The ERA-inspired reforms have been effected through the systematic invalidation of discriminatory facial gender lines and by according meaningful legal recognition to the value of homemaker services. The successful use of the state provisions as law reform tools highlights the need for the proposed federal equal rights amendment, which would provide the constitutional foundation to extend these equitable principles to all fifty states.

We therefore ask you once again to submit to the states for ratification the proposed Equal Rights Amendment, so that all men and women may share in its benefits.

Thank you.

FOOTNOTES

1. Krauskopf and Thomas, "Partnership Marriage: The Solution To An Ineffective and Inequitable Law Of Support," 35 Ohio St. L. J. 558 (1974).

2. W. Blackstone, *Commentaries* 445 (1813)

3. M. Paulsen, M. Washington, and J. Goebel, *Cases and Other Materials On Domestic Relations*, at 912-916 (2d e. 1974).

4. B. Brown, A.Freedmen, H. Katz, A. Price, *Women's Rights and the Law*,at 128 (1977) (hereinafter *Brown*)

5.Mnookin,"Child Custody Adjudication: Judicial Functions In The Face Of Indeterminancy," L. and Contemp. Prob. 226 (1975) (hereinafter *Mnookin*)

6. Krauskopf, "A Theory for 'Just' Division of Marital Property in Missouri,"41 Mo. L. Rev. 165, 168 (1976)

7. *See e.g*. *Wilson v. Wilson*, 57 So. 2d 519 (Ala. 1952).

8. *See e.g*. *Wirth v. Wirth*, 38 App. Div. 2d 611, 326 N. Y. S. 2d 308 (1971)

9. *See e.g*.*Conway v.Dana*, 318 A. 2d 324 (Pa. 1974); *Rand v. Rand*, 374 A.2d 900 (Md. 1977); *Smith v Smith*, 13 Wash. App. 381, 534 P. 2d 1033 (1975)

10. H. Clark, Jr, *The Law of Domestic Relations in the United States*,at 448 (1968).

11. *Holmes v. Holmes*,127 P.L.J. 196 (Ct. Common Pleas 1978)

12. Mnookin, *supra*, n.5

13. Freed and Foster, "Divorce in the Fifty States: An Over-View," 14 Fam LQ.229, 258 (Table viii) (1981)

14. Brown, *supra*, n.4, at 163

15. M.G.L.A. c. 209 sec. 1

16. 331 A.2d ,74 (1974)

17. Va.Code sec.55-47.1 (Replacement Vol. 1980)

18. *DiFlorido*,supra, n. 16

19. *Id*.

Senator **Hatch**. Thank you so much. I appreciate both of the statements you have given and the time that you put forth to be here today.

Traditionally, the area of family law has been within the purview of the States. Am I correct that a State law that was inconsistent with the ERA would be rendered unconstitutional?

Ms. **Levick**. If it were challenged in court that is correct.

Senator **Hatch**. It would be rendered unconstitutional. Do you both agree?

Professor **Wardle**. I agree.

Senator **Hatch**. Now, what I would like to do at the outset is ask a series of questions about the impact of the proposed equal rights amendment in the area of family law or domestic relations law. The purpose, of course, is to obtain a better understanding of the effect of the amendment in this extremely important area.

In large part these questions will be based upon an analysis done several years ago by the equal rights amendment project under the leadership of Prof. Anne Bingaman who we had asked to testify but who indicated last Monday she could not come. I looked forward to seeing Professor Bingaman, because I have great respect for her abilities, but we are very happy to have you here, Ms. Levick. I know you can certainly answer these questions equally well.

To the best of my knowledge, this analysis, a commentary on the effect of the ERA upon State laws and institutions, is the most comprehensive analysis by ERA proponents as to what the amendment means. Do either of you disagree with that? Are you familiar with it?

Ms. **Levick**. Yes.

Professor **Wardle**. Yes, I have read it. I agree that it is one of the most comprehensive, one of the most thorough, yes. I do not agree with much of it.

Senator **Hatch**. I understand. I want to base some of my questions on this analysis because it is an important analysis. Certainly, it is the most comprehensive by the proponents of the equal rights amendment.

Ms. **Levick**. Senator Hatch, I only wanted to add that I am not extensively familiar with Professor Bingaman's analysis.

Senator **Hatch**. All right. That is fine. But I think you are extensively familiar with the law.

Ms. **Levick**. Yes.

Senator **Hatch**. The ERA project states that State laws placing the primary obligation to support the family upon the husband will be unconstitutional under the ERA. Now, would both of you agree with that statement?

Ms. **Levick**. Yes.

Professor **Wardle**. Yes, Senator; again I will qualify my answer by saying, assuming that a stricter standard of scrutiny is applied than under the 14th amendment, and I think that is pretty well accepted. The answer would certainly be yes.

Ms. **Levick**. However, Senator Hatch, the male-only requirement of support has already been stricken by the Supreme Court under the equal protection clause.

Professor **Wardle**. But you did not say male-only requirement. You said primary duty. Now, there is a difference between a requirement that the man be the support of a family and an assumption that the primary support comes from the husband.

For instance, the question is when can you get the wife's assets. If the wife has any income or has any property that belongs to her clearly or in her name, when can a creditor get at that? Can he sue her before going to the husband's assets or does he have to sue the husband first and only if the husband's assets are not sufficient to pay for the necessaries, go to the wife?

There is a difference between male-only support and an order or ranking of who pays first.

Senator **Hatch**. Professor Wardle, what would the ERA's impact be upon that particular issue?

Professor **Wardle**. Upon the primary obligation, it would be unconstitutional. The primary obligation could not be based on sex, could not be put on the husband because husband is a sex classification.

Senator **Hatch**. So where now the wife may be protected in the ownership of her own private assets, she may lose that protection under the equal rights amendment?

Professor **Wardle**. Correct.

Ms. **Levick**. Senator Hatch, if I may, it was my impression that, in part, what Professor Wardle was referring to was the doctrine of necessaries?

Professor **Wardle**. Yes, in part.

Ms. **Levick**. I would just like to make the point that the doctrine of necessaries has curiously, while it appears to suggest that it supports the principle of the husband's obligation of support for the wife, it has never been used and has never been available to the wife to enable her to enforce that obligation of support.

The doctrine of necessaries has always been only available to creditors to seek to enforce debts owed to creditors for particular kinds of services provided to the husband or to the wife.

There have been cases in State ERA States which have looked at the doctrine of necessaries in order to determine whether or not they were considered unconstitutional. In many of the States which have looked at these laws, they have determined that rather than invalidate them or extend them to husband or wife that they would simply return the issue to the legislature and let the legislature decide what would be the appropriate allocation of rights in that instance.

Senator **Hatch**. Am I correct in saying that under the present law, creditors can sue the husband if they have provided necessaries to the wife?

Professor **Wardle**. Oh, yes.

Senator **Hatch**. They could sue either of them then if the equal rights amendment was passed?

Professor **Wardle**. Yes. In some States they can sue both right now, but in some States they have to sue the husband first, and that would be done away with.

Senator **Hatch**. Would it be fair to expect States to revise their family support statutes to place an equal duty of support upon both spouses if the ERA is passed? Would that be constitutional?

Ms. **Levick**. It would be constitutional but I think, again, it is important to recognize what the obligation of support would mean. As we have seen in State equal rights amendment States, that obligation of support has not been translated into a requirement of equal financial contribution but rather a recognition that nonmonetary support can also fulfill that obligation.

Professor **Wardle**. The ERA would require equal obligation of support on both husbands and wives, on both fathers and mothers. I might comment further on Ms. Levick's statement. There are two cases in Pennsylvania that are very disturbing on this very issue.

In both cases, lower courts held that a custodial mother's potential income had to be taken into account in determining how much child support she was entitled to. By "potential income" we mean how much she could earn if she would go out of the home and get a job.

One example involved a woman who had been an elementary schoolteacher for 6 years before her first child was born, and then she quit to stay in the home. She had two children, got a divorce.

The question was how much child support—I do not remember if it was an original proceeding or modification. The lower court looked at how much she had been earning when she quit working and took that amount of money into account and said, since she could earn that much money if she would go out of the home, we are going to take that factor into consideration and reduced the amount of child support she was given.

Senator **Hatch**. From the husband?

Professor **Wardle**. Yes, the amount of child support she was given by the husband. Now, in both of those cases, appellate courts, intermediate courts of appeal—I believe they were intermediate—reversed in split decisions, and both of them had some very good language about how a woman ought not to be put to work.

But both of them were split decisions. In one of them one judge dissented. A second judge said, "Well, in this case, the children are young enough that we should not require taking into account her potential income."

The negative pregnant is if the children were a little older, it would be the judge that would decide and not the woman when she had to leave the home, when she should leave the children in the care of someone else and go out and make money.

Senator **Hatch**. And she might have to provide equal support based upon her prior earnings record, whether or not she has a job at the particular time.

Professor **Wardle**. Yes, whether or not she wanted to. If she chose to stay in the home, the court would say, "Well, that is fine, but we are going to reduce the child support the husband will have to pay you because you could leave these children in a day care center and go earn a whole lot more money."

Ms. **Levick**. Senator Hatch, I am not saying that and I do not agree with the interpretation that Professor Wardle has given to those decisions.

Senator **Hatch**. You do not agree?

Ms. **Levick**. I do not agree. I think that the appellate decisions in reversing those rulings again simply supported the Pennsylvania Supreme Court analysis which has clearly stated that the ability and the right of the woman to remain in the home and provide care and custody to the children there does fulfill her obligation of support, and by no means does the equal rights amendment require her to go out to work.

Professor **Wardle**. I agree that the woman's contribution in the home is probably more valuable and worth more in economic terms as well as in intangible terms than how much she will earn out of the home, and that is what the Pennsylvania higher courts held.

But the fact of the matter, and it cannot be denied because it is a fact, is that two trial courts, courts of first instance, held otherwise, and the intermediate courts were split in reversing, and so the issue——

Senator **Hatch**. And if the facts were slightly different, some of the consequences you are talking about might occur?

Professor **Wardle**. That is right.

Senator **Hatch**. OK. Would criminal nonsupport laws be rendered unconstitutional to the extent that they placed unequal obligations upon the husband and wife?

Professor **Wardle**. Definitely.

Senator **Hatch**. Do you agree with that, Ms. Levick?

Ms. **Levick**. Well, I agree that any kind of support laws which, again, draw lines across gender lines and gender distinctions would be unconstitutional.

Senator **Hatch**. Would those statutes have to be stricken?

Ms. **Levick**. Yes.

Senator **Hatch**. The ERA project argues that laws against common-law marriages are possibly in violation of the ERA because such laws deny women important benefits, including the right to property accrued by the husband during the marriage. Would both of you agree with that statement?

Ms. **Levick**. Well, it is my understanding that that project is some years old and certainly what we have seen in this area is an enormous development of legal doctrine regarding the rights of parties to property and to share in property distribution even though they have not married.

So that I think, given the fact that this is an emerging area of the law, an emerging doctrine, that it would be difficult at this time to say for sure that common-law marriage would be stricken because of the reasons that have been set forth.

Professor **Wardle**. I agree with Ms. Levick that it is very difficult to predict, but certainly that is a possibility.

Senator **Hatch**.You seem to be saying that to the extent the law of "palimony" has developed the ERA might be irrelevant in the final analysis.

Ms. **Levick**. That is right.

Senator **Hatch**. Do you agree with that?

Professor **Wardle**. In those States, yes, but it has not developed equally in every State.

Senator **Hatch**. But what if "palimony" laws are not developed in some States? Will common-law marriages then have to be recognized?

Ms. **Levick**. I think that the issue would really turn on the constitutional analysis that would have to be applied to a challenge to common-law marriage. The issue would be to what extent that particular form of relationship, in fact, does discriminate against women.

Senator **Hatch**. That is obviously one of the questions at the heart of this issue. Let me ask you this. The ERA project states that "loss of consortium" statutes will be unconstitutional under the ERA unless the wife, as well as the husband, is accorded an independent right of action on this basis. Now, do both of you agree with that statement?

Ms. **Levick**. Yes, and in fact, that has happened in many State equal rights cases.

Senator **Hatch**. I understand. But we are talking about the impact of the Federal ERA. Do you both agree that both the husband and the wife would have right of consortium.

Ms. **Levick**. Yes.

Professor **Wardle**. You bet, and frankly I personally agree that that ought to be the result.

Senator **Hatch**. That may be so.

Professor **Wardle**. And, Senator, it is the law in most States, even those that do not have the ERA. I might say that the positive development that Ms. Levick—many of the positive developments that she referred to in her testimony that have taken place in States that have adopted the ERA have taken place in other States that have not adopted the ERA, and you do not need an ERA to achieve those reforms.

Senator **Hatch**. In other words, the reforms for which there might be widespread support have been evolving both in States that ratified the ERA and in States that did not.

Professor **Wardle**. Yes. In fact, there is a study that is quoted in Herma Hill Kay's excellent book. I have not read the study, but I read her excerpt quoting it, and it says: "States which have not ratified the ERA have neither been callous nor insensitive to women's rights, rather they have chosen an alternative approach to protecting those rights which has succeeded in combating the sex discrimination without mandating an absolutist approach regarding sex distinctions."

Senator **Hatch**. It would appear that the debate over the equal rights amendment may have been salutory since there have been many voluntary changes in States even though the equal rights amendment has not been ratified?

Professor **Wardle**. Exactly.

Senator **Hatch**. In addition, there are some States without the ERA which have adopted positive reforms that other States with the ERA have not adopted?

Professor **Wardle**. You are right. Senator, with respect to consortium, though, I do not know of any States still that discriminate on the basis of sex, and if Ms. Levick knows of any, I would be happy to correct that.

Ms. **Levick**. I do not know of any States that continue to maintain that distinction.

Senator **Hatch**. But if there is a State where both the husband and wife have not been granted consortium rights, the ERA would impose that upon that State.

Professor **Wardle**. No. Where they have not been granted equal rights. Utah does not allow the right of recovery for consortium to either husband or wife. So it would not mandate—well, perhaps it could. An argument could be made that it would mandate, but to date, it has not. I am not aware of it having been made.

Senator HATCH. I suspect that if the Congress under the ERA passed a law mandating consortium rights all States would have to abide by those——

Professor WARDLE. Certainly.

Senator HATCH. Would you agree with that, Ms. Levick?

Ms. LEVICK. I do not know that Congress would do that.

Senator HATCH. Well, I do not know that they would either.

Ms. LEVICK. Well, I think that one of the points that we can also derive from this discussion here is that the fact that there have been so many positive changes already both as a result of the equal rights amendment passage in some States and the debate that it has fostered should also somewhat curb some of our concerns about the enormous amount of litigation that might flow as a result of the passage of a Federal equal rights amendment.

Professor WARDLE. May I respond to that? The statistic she said to her knowledge the amount of litigation has gone down. To my knowledge, the amount of litigation has continued to increase over the last few years and I am aware of no study that shows statistically that there has been less family law litigation or a drop in the family law litigation in those States that have adopted the State ERA's.

In fact, I am not aware of any statistical evidence, but I am confident that if studies were done, it should show that in those States the amount of litigation has increased in the family law areas since those States adopted the State ERA's because it has increased in every State.

Ms. LEVICK. I did not say that.

Senator HATCH. I think it is pretty hard to say one way or the other. We are talking about State ERA's vis-a-vis a Federal ERA. I think there is a real distinction between the two.

Ms. LEVICK. I would also just like to say that the point I made in my testimony was not to say that State equal rights amendments had, in any way, reduced the amount of litigation in the area of family law, but merely to make the point that in all areas of the law we have not seen an enormous spurt in the amount of litigation under State equal rights amendments. To the contrary, there has been generally very little litigation.

Senator HATCH. While some of these policies are very good ones in the eyes of many people in the States which adopt them, it may be another matter if they are mandated by the Federal Government. One of the issues concerning the equal rights amendment is that it will federalize the area of domestic relations laws which have, in the past, been the domain of the State and local governments. It is not always clear that there is a single best, indisputably right policy that ought to be nationally imposed.

Do you disagree with that?

Ms. LEVICK. I do not think that the principle of equality that would be required to be extended to all the States through the passage of an equal rights amendment is a troubling one. There are many other constitutional——

Senator HATCH. That is a philosophical point.

Ms. LEVICK. Yes, but what I am saying is that the constitutionalization of family law, I think that that is an overstatement of what would occur. We have other constitutional provisions that dictate how criminals get administered in many of the States or that dictate what States can do in the area of first amendment regulation.

The fact that we would have a Federal regulation that would dictate what States can do in the area of family law, consistent with the principle of equality, is not inconsistent with our system of federalism.

Senator HATCH. I think it is. One of the ways that laws do evolve in our society is because the State and local governments can engage in trial and error. They might not be able to do the experimenting under the ERA that has, through the years, produced better laws.

There would be no incremental reform. Policy would just be mandated from on high, with some of the mandates perhaps not being very good.

Ms. LEVICK. I do not think that the equal rights amendment is meant to inhibit the ability of States to continue to use trial and error and to continue to experiment in the way in which they craft their laws.

But again, like other constitutional principles they will, in fact, and correctly be limited in the range in which they may experiment by an equality principle.

Senator HATCH. The wide-ranging effects of the ERA's "equality principle" seem to have the potential to dictate a fairly narrow range of choices available to the States.

Ms. LEVICK. But, Senator Hatch, we have other constitutional provisions that define due process, that define free speech, that define equal protection that the States area also limited by.

Senator HATCH. And they are constantly in conflict and constantly in litigation and constantly being defined. And, for the most part, they are defined by the Federal Government and not by experimentation, trial and error, or incremental development by State and local governments.

Ms. LEVICK. But I think when you are dealing with fundamental liberties, you do have to have some kind of national standard that insures that individuals are not discriminated against.

Senator HATCH. But who defines those? You? The equal rights amendment supporters? The Federal Government? Members of Congress? Or do the institutions of government closer to the people have some voice?

Professor WARDLE. Mr. Chairman, I think that Ms. Levick suggested a very apt analogy which she is comfortable with and which I am not. She suggests that to the extent that the first amendment—the same impact that the first amendment has had on the States' abilities to regulate speech and press and the same effect that the fourth and sixth amendments have had on the States' abilities to regulate criminal law, to that same extent the equal rights amendment would have an impact on States' abilities to regulate domestic relations.

And I find that very troubling. I think one of the strengths of this country is the diversity that is possible because we are "united States" not merely one monolithic government. We are a Nation of pluralities, and by constitutionalizing family law, it would not be possible for the States to recognize their unique and different pluralities.

Senator HATCH. That is one of the reasons I am critical of the equal rights amendment. But there are sincere people on both sides of these issues, and what one group defines as discrimination may not be defined as discrimination by another group in society. There are honest disagreements.

Let me ask another question. The ERA project states that laws which either require or presume that a wife take the surname of her husband upon marriage will be in violation on the ERA. Do both of you agree on that?

Professor WARDLE. I agree that would be a likely result.

Senator HATCH. Do you agree?

Ms. LEVICK. I agree it would be a likely result. I agree it is also essentially occurring now anyway.

Professor WARDLE. Oh, I disagree. With respect to the presumption? You mean States cannot presume that a woman has the surname of her husband?

Ms. LEVICK. However, women have the right to not take their husband's name without an equal rights amendment.

Professor WARDLE. Correct. And we all welcome this change. The States cannot require a woman to take her husband's name. But can the State presume that she does? Can the State presume that she does? And I agree that the equal rights amendment could and many supporters suggest that it would prohibit that presumption.

The classic article, the "Brown, Emerson, Falk and Freedman" article, says that even the presumption that a married woman takes the name of her husband would be unconstitutional.

Senator HATCH. Well, let me make it a little more definitive. What about the laws which either require or establish the presumption that children take the surname of the male parent? Would that be unconstitutional under the ERA? Ms. Levick.

Ms. LEVICK. Yes, it would be.

Senator HATCH. It would be?

Professor WARDLE. Yes.

Senator HATCH. The ERA project states that laws which require the wife to take the official domicile of the husband are unconstitutional under the ERA. Would you agree with that?

Ms. LEVICK. Yes; I would agree that that would be unconstitutional under the ERA.

Senator HATCH. Do you agree, Professor Wardle?

Professor WARDLE. Yes; I agree.

Senator HATCH. Would it be unconstitutional to require spouses to take the same domicile, however determined, or would that be impermissible under the ERA?

Ms. LEVICK. I do not understand the question.

Senator HATCH. In other words, could a State say that both spouses have to take the same domicile or could the wife or husband have the right to establish a different domicile?

Ms. LEVICK. If the State is imposing equal obligations on both spouses, I do not see how that runs afoul of the equal rights amendment.

Senator HATCH. I am not saying it does. I want to ask you whether it does or does not.

Professor WARDLE. In general, I agree with Ms. Levick's response, but to the extent that such a rule requiring married persons to have the same domicile as each other would treat married women and men different from unmarried women and men and give them a different right solely because of their relationship with a person of the opposite sex, an argument could be made that those laws would be unconstitutional.

I have not thought that through carefully, but I can certainly see the argument.

Senator HATCH. You can see the conflict that might arise. Let me be more specific. The ERA project states that laws which require children to take the same domicile as the father will be unconstitutional. Do you agree with that?

Ms. LEVICK. Yes, I do.

Professor WARDLE. Yes.

Senator HATCH. The ERA project states that all laws which establish different ages at which men and women may marry would be unconstitutional under the equal rights amendment. Do you agree with that?

Ms. LEVICK. I agree with it because, again, it perpetuates this kind of sex stereotype that women ought to get married at an earlier age because that is the appropriate course for them.

Senator HATCH. Do you agree, Professor?

Professor WARDLE. Well, I agree but I would like to expand. First of all, there is no State that I am aware of—I do not believe that there is a State that has a different age for majority—the absolute right to get married by yourself—for men and women. But there are States, about 10 States, that provide that women can get married with parental permission at a younger age than a man can get married with parental permission. We are not talking about men and women. We are talking about boys and girls. Some States do have a lower age and those would be held unconstitutional under the ERA.

Senator HATCH. OK. The ERA project suggests that the ERA may effect major changes in the legal rights of unwed parents. Following adoption of the ERA, would the law have to accord equal rights to the natural mother and the natural father of a child born out of wedlock?

Prof. Ann Freedman, for example, has stated that the ERA would result in the overturning of the Supreme Court decision, *Parham* v. *Hughes*, a 1979 case in which the Court upheld a Georgia statute treating the father and mother of illegitimate children differently for purposes of "wrongful death" statutes.

Similar controversies have arisen in the context of adoption rights. Would the ERA require that equal rights be accorded the natural mother and the natural father of a child born out of wedlock?

Ms. LEVICK. Yes, I agree with Professor Freedman's analysis.

Senator HATCH. What about you?

Professor WARDLE. I agree that that would be the result, and I might say that is one of the most troubling concerns. It would make it harder than it presently is for an illegitimate child to be adopted. At present time in most States, I believe in every State, the mother of a child born out of wedlock can release the child for adoption with significantly greater ease than the father, less protection for the father's interests. In other words, some States require the father of a child born out of wedlock to register his claim of paternity. If he does not register, he does not even get notice.

Those laws which are based on a presumption that the mother of a child born out of wedlock has a greater interest in the child would be struck down and I think the result would make it harder for illegitimate children to be adopted.

Senator Hatch. Do you agree with that?

Ms. Levick. I agree that the laws would be struck down. I think that the issue that the law would be addressing is recognizing that the sex-based presumption that the mother does have some kind of special and closer tie to the child is, indeed, simply based on stereotype and that the unwed father should have an opportunity.

Senator Hatch. But the laws would be struck down and an unwed father, if he wanted to, for any reason, could prevent an adoption.

Professor Wardle. Yes.

Ms. Levick. I do not think our laws are that inflexible for any reason. There is a system that governs the situation of termination of parental rights. If the parents do not themselves voluntarily terminate, a court can seek involuntary termination of parental rights.

Senator Hatch. Let me make it any reasonable justification.

Ms. Levick. Well, I think that the best interests of the child also governs in those cases so that I am only suggesting that we ought not assume a situation that would not, in fact, exist.

Senator Hatch. But you do agree the statutes would be struck down.

Ms. Levick. I agree that the statutes would be unconstitutional.

Professor Wardle. There is an interesting case in Utah that I am familiar with, the *Ellis* case, in which a woman got pregnant. She was engaged to a young man. This was down in California. Then she broke the engagement and did not want to marry the young man.

She went up to Utah to stay, made arrangements to come up there and stay with friends and family. She had previously been a student in the State and gave birth to the child in Utah.

Utah has a law that says if the father of a child born out of wedlock has not filed a claim of paternity, then his consent is not necessary to the adoption. As soon as the child was born or a few days after the child was born, this woman gave up the child for adoption.

The father got wind of it a short time later, and came from California to Utah and brought suit to set aside the adoption. He did not care about the child. He did not want to have custody of the child. All he wanted was to manipulate the woman to marry him. He wanted to force her into a relationship with him that she did not want, and he found a handle whereby he could manipulate her, and that was the child.

He would not agree to the adoption of the child unless she would resume her relationship with him. As a result, the woman was forced to either take the child herself or the State would take the child. The father would have the right over any other third person, and so this man was able to force her to keep the child that she wanted to release for adoption for the sake of the child and for her own sake so that she could go back to college.

She was deprived of that chance. She had to take the child, forego her education, because the laws allowed this man to manipulate her in that way. I think it would make adoption harder. To that extent it would give women who are pregnant with children out of wedlock a greater incentive to have abortions when even they may not want to have the abortion, but because they are afraid that if the child is born they will not be able to release the child to a couple who are loving and who want to raise the child and adopt the child.

Ms. Levick. I just want to make the point that I think that what Professor Wardle's analysis overlooks and which it seems to somehow include in its comments is again an assumption that the unwed father would be an unsuitable parent for the child and it may well be that there are unwed fathers who would be suitable parents.

And rather than presenting a situation in which the unwed mother would be required to have an abortion or forced to have an abortion because suddenly the unwed father has the right to oppose the adoption, she may, indeed, find that there is another alternative, and that is to give the child to the child's natural father.

Senator Hatch. In this case, the unwed father did not want the child. He just wanted to manipulate the mother?

Professor Wardle. Yes, and I think here again we see the difference, the problem with the equal rights amendment in adopting an absolute standard, because not only does it strike down laws that say the father has no rights based on the presumption that the mother of a child born out of wedlock is the better custodian and will have greater interests, but it also strikes down the presumption that gives the mother the benefit of the doubt and by giving her the benefit of the doubt gives her greater rights or gives the father lesser rights or says, the father, to exercise his parental right, has to do something, file a registration, that the mother does not have to do.

And to that extent, that it is based on a presumption, not a hard and fast rule blocking the father out, but a mere presumption that makes him do something that the woman does not have to do, a minor inconvenience, even that minor inconvenience is based on a presumption that is prohibited and it is an objective distinction based on sex and would be unconstitutional under the ERA if strictly interpreted.

Senator Hatch. You raised an interesting issue, and that is, would the ERA establish equal rights in the mother and the father with respect to the abortion decision? What do you think?

Ms. Levick. I think that the Supreme Court has made clear under its privacy analysis in *Danforth* that the right of consent to the abortion resides with the mother alone and that the Court could never, in any circumstance, give a third party the right to veto that decision.

Senator HATCH. That would not be changed by the ERA, would it?

Ms. LEVICK. I do not believe it would be changed by the equal rights amendment.

Professor WARDLE. One of the most tragic effects of this brutal doctrine of abortion on demand is that even fathers whose interest in their unborn child may be greater than any other interest they have in life have no protection.

And the effect of the equal rights amendment on that state of affairs is unclear. It could be argued that the father has to have an equal right and thus a married woman needs her husband's consent or an unmarried woman needs the father of the unborn child's consent to destroy that life in being.

On the other hand, it could be argued that this is a part of the right of privacy which is one of the exceptions to or qualifications of the absolute standard of the equal rights amendment.

Senator HATCH. In some States, it is grounds for divorce if, for example, a woman was pregnant by another man at the time of the marriage. Would the ERA render such laws unconstitutional? Ms. Levick.

Ms. LEVICK. I am actually not familiar with many States that still have that law, but to the extent——

Senator HATCH. There are a few States that do, I believe.

Ms. LEVICK [continuing]. To the extent that that kind of a State law again perpetuates the notion that there is something special and possessive about a husband's right to his wife that the wife does not share in regards to her husband, I think those laws would be ruled unconstitutional.

Senator HATCH. Professor Wardle.

Professor WARDLE. Most commentators say that those laws would be ruled unconstitutional. I do not think their analysis is good because the assumption that underlies the rule that allows a man to annul a marriage if his wife was unknowingly pregnant by another man at the time of marriage is not based on any notion that the husband can have sex with whomever he wants and the woman can only have sex with her husband. It is based on the violation of one of the fundamental assumptions of marriage itself—that during marriage the woman will conceive and bear children only of her husband and not of anyone else.

And to the extent that that might come within the unique physical characteristic exception I do not know.

Senator HATCH. Let me ask you this. With respect to child custody, the ERA project states that so-called tender age laws which establish the presumption of custody in the mother are unconstitutional. Do you both agree with that?

Ms. LEVICK. Yes.

Professor WARDLE. That would be the effect.

Senator HATCH. The ERA project states that new forms of child support enforcement and debt collection laws will be required by the equal rights amendment. Would you agree that this would be necessary in order to comply with the amendment?

Ms. LEVICK. I think that it is quite possible that in States which have no kind of wage garnishment or significant enforcement mechanism for support awards, but they have other kinds of enforcement mechanisms for other kinds of civil debts that there may well be a requirement that these kinds of enforcement mechanisms be extended to the support area.

Senator HATCH. I see. Professor Wardle.

Professor WARDLE. Most likely, and I would add, again, this is one of the changes that I would welcome.

Senator HATCH. OK. The ERA Project states that the Uniform Reciprocal Enforcement of Support Act adopted by a number of the States would be unconstitutional under the ERA because it imposes a different duty of support upon women than upon men. Do both of you agree with that statement?

Ms. LEVICK. To the extent that it imposes a different requirement of support, I would agree.

Professor WARDLE. To the extent that there is sex discrimination, yes.

Senator HATCH. OK. The ERA project states that State alimony laws which only allow alimony to the wife, not the husband, upon divorce would be unconstitutional. I think both of you have agreed with that statement.

Professor WARDLE. They already are.

Senator HATCH. All right. That is *Orr* v. *Orr*?

Professor WARDLE. That is correct.

Senator HATCH. If a long-term analysis of the allowance of alimony determined that a disproportionate number of alimony awards in some jurisdiction went to women, would the law in such a jurisdiction be unconstitutional because of the disparate impact upon men? Ms. Levick.

Ms. LEVICK. I do not think they would be ruled unconstitutional. In a disparate impact analysis under the equal rights amendment, as under the equal protection clause, one would want to be looking at the basis for the classification and the extent to which that classification reenforced sexual stereotypes.

As with discussions that I know have been presented before this committee on the progressive income tax which one might also argue disadvantages men, an increased number of support awards to women in the event that those awards were appropriately extended could not be considered to be discrimination against men. In fact, what they would be doing would be attempting to ameliorate the effects of discrimination against women.

Senator HATCH. As you know, however, most advocates of the ERA contend that it would outlaw even public policies resulting in an equal impact upon a defined category of people?

Ms. LEVICK. I do not understand.

Senator HATCH. Haven't ERA proponents consistently argued that the disparate impact notion of discrimination applied to the ERA and that the purpose behind a public policy was not necessarily relevant?

Ms. LEVICK. That is not my understanding of what the proponents of the equal rights amendment have said.

Senator HATCH. All right. Professor Wardle.

Professor WARDLE. I am not sure what the outcome would be on disparate impact in alimony awards. I think a good example is in child custody cases. If you could find that 80 percent of the child custody awards in contested cases went to women, would you have to require the court to award custody in half the cases to fathers?

Senator **Hatch**. It would certainly give men an opportunity to come in argue that their constitutional rights are being violated.

Professor **Wardle**. You bet, and that is the problem. There is a real tension between de facto and de jure discrimination. Sometimes you can have sex-neutral language and still have sexual distinction in outcome, and if you attempt to require equality in outcome, what you do is set up quotas and effectively change the sex-neutral language.

How that tension would be resolved under the ERA I do not know. There is such a tremendous debate under the 14th amendment. The whole area is unclear.

Senator **Hatch**. If I could make one comment, we did have a hearing on this and even proponents agreed that the disparate impact analysis or the effects test would apply. Even the proponents have testified that that is so.

Ms. **Levick**. I was not disagreeing that it would apply. I was only responding to your comment that it would prohibit all classifications, and it is not my understanding that that is what it will affect.

Senator **Hatch**. But it will apply. What you are saying is that there will be distinctions between good and bad classifications.

Ms. **Levick**. I only wanted to make a comment regarding the child custody situation. There have been two attempts that I know of in Colorado to make the argument that, in fact, unequal amounts of custody awards to women did constitute disparate impact, and those arguments were rejected largely for the reasons that I set forth which is that it does not, in fact, reflect discrimination but rather a reasonable judgment of the court as to what is appropriate in those kinds of cases.

Professor **Wardle**. I am also aware of two cases in Colorado in which the argument was made in the child custody context. In the *In Re Franks* case, the Colorado Supreme Court rejected, and I do not have the language at my fingertips, but the argument was made that because more women than men were awarded custody that the system of awarding custody was unconstitutional under the State ERA.

The judges said:

> We reject that position because the statistics you have presented to support your argument do show that more women than men get custody but they do not let us know whether the men in those cases wanted custody, whether they were contesting custody. They just let us know the outcome.

Senator **Hatch**. Had they wanted custody——

Professor **Wardle**. The negative, the negative pregnant in that statement is that if the men had wanted custody and if the statistics showed that greater percentage of women got custody than men, then you would have a violation of the State ERA.

And that gets us into quotas in which we end up doing what we intended to abolish in the name of equality.

Ms. **Levick**. Well, I would have to disagree, first of all, that the equal rights amendment, in any way, would require equality of results or exact equality of numbers. The equal rights amendment as with our other antidiscrimination provisions is really about providing and promoting equality of opportunity.

Professor **Wardle**. But, you know, we have a 14th amendment, and the purpose of the equal rights amendment, they say, is to make sex be treated as the same kind of a classification as race is.

What about quota systems? What about affirmative action? What about Bakke? What about Weber? Can we simply transform those concepts and put them in the sex discrimination area so that we do have, do allow, do permit and, in fact, judicially do require, in some cases, quotas.

Senator **Hatch**. In other words, this is going to be left up in the air and it may very well come down to where you have application of the quota mentality in quotas in custody battles.

Professor **Wardle**. Precisely; 30 years ago when the Supreme Court decided *Brown* v. *Board of Education*, no one would have believed you if you had said that in order to achieve racial equality you would set up racial quotas.

Thirty years from now we may look back and be saying the same sort of things about sexual equality in family relations, custody, alimony. I would hope that it would not develop that way. It should not develop that way, but we ought to try to do something to insure that it will not develop that way.

Senator **Hatch**. We may not be able to do that if the ERA is locked into the Constitution.

Professor **Wardle**. Exactly.

Senator **Hatch**. The ERA project states that awards of alimony, dependent upon concepts of fault in the breakup of the marital relationship, would be unconstitutional under the ERA. Do both of you agree with that conclusion?

Ms. **Levick**. I am not exactly sure in what context the statement is being made. However, to the extent that we know for a fact that fault in many instances in the past has been used discriminatorily against women in that women who have been held at fault have been awarded lesser support whereas men who have been held at fault have not been penalized with a greater amount of support. I think there is some inherent discrimination in the way in which it has been applied.

Senator **Hatch**. Let me clarify that a little bit. Prof. Barbara Brown in her textbook on women's rights has stated that the use of fault as a factor in the determination of either support or alimony obligations would be unconstitutional because it would have a negative disparate impact upon women. Do you agree with that?

Ms. **Levick**. I think that is the same point that I just made that we have seen it applied unevenly between women and men.

Senator **Hatch**. But it would be rendered unconstitutional. You would agree with Barbara Brown?

Ms. **Levick**. I think that it would be subject to a disparate impact analysis.

Professor **Wardle**. If her assumption is correct, her conclusion is. I am not sure that her assumption is correct.

Senator **Hatch**. The ERA project has stated that the termination of alimony upon the remarriage of a spouse receiving the alimony would be unconstitutional. Do you both agree with that statement?

Ms. **Levick**. The termination of alimony?

Senator HATCH. Yes; do you agree with that? That is the conclusion of the ERA project study.

Ms. LEVICK. If the statute required that alimony be terminated on the remarriage of either spouse who was receiving the alimony, assuming that alimony in and of itself was sex neutral, I do not see any violation of the equal rights amendment.

Senator HATCH. Do you agree with that?

Professor WARDLE. I would agree with Ms. Levick's analysis. I think the ERA project is wrong on that, but I am not sure why they reached that conclusion. I cannot recall what was the argument behind it. Maybe it is a disparate impact argument.

Senator HATCH. This study is an extremely interesting one. It says:

> Although, as we have seen, alimony is awarded in less than 10 percent of all divorces, several aspects of it today are sex discriminatory and will be unconstitutional after passage of the equal rights amendment.
>
> First, under present law in many states, alimony is awarded only to wives and is payable only by husbands. Secondly, awards of alimony are based, in many instances, on concepts of fault in the conduct of breakup of the marital relationship.
>
> Third, alimony almost always ceases upon the wife's remarriage. Finally, because in many states alimony is payable only by husbands, men alone are subject to criminal sanctions for nonpayment of alimony.
>
> In all of these cases alimony as it is known today is sex discriminatory. Statutes which conform to the Equal Rights Amendment must include the following provisions . .

And then they go into those provisions.

I would appreciate it if you would both look that study over and offer additional comments. This has been an extremely interesting hearing. It has been one of the most interesting ones for me.

Of course, domestic relations law comes right down into the basics of life for all of us. So by nature I suppose it would be more interesting. But both of you have been just excellent in presenting your respective points of view here today.

Do you mind if I keep going?

Senator DECONCINI. Go ahead.

Senator HATCH. I would be happy to yield anytime you would like, Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman. I have no questions.

Professor WARDLE. Mr. Chairman, before you go on, as you read that, again, that does not give the reasoning for their conclusion, and it seems to me that their reasoning on this point is pretty suspect.

But there is one point that this brings to mind. Some people thought that by throwing out fault you would help women, and so we have no-fault laws. Prof. Lenore Weitzman has produced a very compelling, a very moving study of the impact of no-fault laws on women and children in which she uses the term "improverish."

She says that divorce under the no-fault statute in California impoverishes women and children. Ironically, by doing away with sex-based kinds of presumptions and fault-based kinds of presumptions, there was an old rule of thumb that a woman would get about one-third if there had been a significant period of time of marriage.

Well, now they have abolished that presumption, and what did they put back in its place? Well, something that makes it harder for the woman to get anything. She has to prove every point and prove it in the face often of a hostile judge who thinks: "Look, you can go out and get a job. So I will give you 2 years of alimony to get schooling and then you can support yourself," after 15 years of marriage. As a result, ironically, Professor Weitzman points out the impact of abolishing these kinds of presumptions has been to hurt rather than help the homemaker.

You see, judges who have to decide these very difficult cases do not sit and ponder on them for hours and days. They have a heavy caseload, and when the case comes before them, they resolve it quickly and move on to the next one. They do not devote a lot of attention to the particular facts and circumstances. They simply move right through it, and it is very difficult. It creates a greater burden on the women to receive anything if she has to start from scratch rather than start from a presumption.

Senator HATCH. I did not mean to cut you off, but let me give you one other paragraph in the ERA study itself. It explains why alimony is unconstitutional:

> Under current practice, a wife's remarriage terminates alimony payments and a husband's remarriage often serves as a reason to reduce the amount of alimony owed his former wife. Again, to the extent that alimony serves as pay for uncompensated work performed during marriage, to end alimony upon remarriage will, in many instances, serve to discriminate against a wife who worked without pay in her former home.

Do you agree with that underlying assumption?

Ms. LEVICK. Well, I would reiterate the point that I made earlier, which is because alimony payable only to women has been stricken down now in most States, that what we really need to be concerned about is an equal treatment of men and women following divorce or remarriage and termination in either case, and if both men and women were treated equally, if alimony terminated in neutral terms at the time that the party receiving it remarried, I do not think that there would be a violation of the equal rights amendment.

Senator HATCH. But even though the study presumes alimony being paid to both sides, they say its termination upon remarriage would be unconstitutional. That is what the study concludes basically on the basis of the disparate impact analysis.

Ms. LEVICK. Well, I am not sure that I agree with the conclusion.

Senator HATCH. OK.

Ms. LEVICK. I just wanted to make the point. I am very glad that Professor Wardle brought up Lenore Weitzman's study. It is a study that many of us have looked at and have been very troubled by because of the enormous disparity that it represents and reflects in the economic condition of women following divorce.

But I think it is important to recognize that one of the important findings that her study indicates is that it is, indeed, the lack of credibility and value that is accorded women as homemakers that has contributed to their impoverishment, and certainly not exclusively an indication of whether it is fault divorce or no-fault divorce.

Senator HATCH. The ERA project states that laws which require courts to deny women custody upon proof of adultery or misconduct, but which do not apply similarly to men, will be rendered unconstitutional. Do both of you agree with that?

Ms. LEVICK. Yes.

Professor WARDLE. Yes.

Senator HATCH. The present Solicitor General of the United States, Rex Lee, has written that the ERA will not only affect the prospective application of State alimony and custody laws but that it will also call into question existing alimony and custody orders handed down under existing, newly invalid laws since such orders are in the nature of continuing orders.

To what extent will ERA be applicable to such exising orders?

Ms. LEVICK. First of all, custody and support awards are always subject to being reopened. They are continuing orders and there are always grounds which permit modification or reconsideration.

Senator HATCH. But assuming that existing laws are found to be sex discriminatory——

Ms. LEVICK. I think that Congress could, in its legislative history, certainly indicate its view about retroactivity of the amendment and the extent to which it would require a reopening of these awards.

Senator HATCH. Marna Tucker, one of the proponent witnesses at our first ERA hearing, said that existing alimony and custody orders would be opened up if the ERA was deemed to constitute "a major change in circumstances." Would you agree with that? Would the ERA constitute a major change in circumstances?

Ms. LEVICK. Custody and family relations law has typically looked to changes in fact as changes in circumstances. Whether or not a change in the law would constitute this type of change in circumstances is one that I am not absolutely certain about.

But I think the point to reiterate here and to underscore is that the area of family law has always been a very volatile and ongoing consideration of the obligations and rights of the parties involved.

To whatever extent an equal rights amendment might require reconsideration of some of these awards, I do not believe it would be any greater than the extent to which many of these awards are currently being reopened.

Professor WARDLE. Mr. Chairman, I, first, disagree with the statement that you read from the previous witness. I do not think that you would have to find that there was a change of circumstance in order to find that custody and support orders would have to be reviewed, because change of circumstance is the statutory or common-law standard for modification of custody and support.

Those are not superior to the Constitution, and if the equal rights amendment is passed, it will become a part of the Constitution and will supersede those. So you do not need to have—you might not even need to satisfy the statutory grounds to modify custody and award.

The second element is, what is the retroactive effect. There could be two effects. One effect would be, since a woman was given a greater amount of money under the pre-ERA than she would be after the ERA, she has to give back the money she got. I do not think that effect would flow. I do not think they would require women to return money.

But I do think that it is likely that they would have to reconsider, if a woman came in or a man came into court, reconsider custody and support decrees under the new standard, which is constitutionally required, because the court has continuing jurisdiction, and to allow the old sex-based standard and decree to stand would allow a continuing legal imposition that violates the ERA.

Ms. LEVICK. I would just add here that to the extent that the ERA might, indeed, require a reopening some of these awards, what it probably would do is benefit those women who have not been accorded the full value of their own homemaker status in prior awards.

Senator HATCH. Under the ERA, would laws providing tax exemptions or other tax benefits to widows but not to widowers be unconstitutional?

Professor WARDLE. I believe they would, yes.

Ms. LEVICK. I think they would be.

Senator HATCH. OK. Would the Court's decision in *Kahn* v. *Shevin*, the 1974 case, be overturned?

Professor WARDLE. I believe that it would be because that was decided under the 14th amendment, and the ERA is intended to go further and be tougher than the 14th amendment.

Senator HATCH. Do you agree with that?

Ms. LEVICK. The ERA does not prohibit an affirmative action rationale in looking at cases of sex discrimination so that I would not agree in the sense that it would automatically require reversing *Kahn* v. *Shevin*, although I think it is very possible that that decision would not stand under the equal rights amendment.

Senator HATCH. In that case, the Court upheld a statute that provided widows with tax exemptions but not widowers. So you are saying it would be overruled.

Professor WARDLE. Yes. Mr. Chairman.

Ms. LEVICK. Yes.

Senator HATCH. OK. That is all I need to know.

The ERA project states that separate property systems or common-law-property systems may be unconstitutional after passage of the ERA since these are laws neutral on their face but discriminatory in impact.

The project further describes this particular impact of the ERA as "one of the most important reforms ever to take place in American law." Do you agree with that statement?

Ms. LEVICK. I am sorry, but I think I missed the key part of your question.

Senator HATCH. OK. The project states that separate property systems or common-law-property systems may be unconstitutional after passage of the ERA because these are laws "neutral on their face but discriminatory in impact."

Now, the project describes this effect of the ERA as "one of the most important reforms ever to take place in American law." Do you agree with that statement?

Ms. LEVICK. The continuing effect of common-law property States has largely been minimized by the passage of equitable distribution laws that have essentially managed to overcome the total presumption that common-law property States place in the hands of the man.

To the extent that there would be any kind of lingering discrimination in those States, I think that the analysis is correct in that the discriminatory impact of title laws might well result in their invalidation under an equal rights amendment.

But I think it is important to recognize that in most States this is already taking place.

Senator HATCH. Thank you. Do you agree?

Professor WARDLE. Yes, it would invalidate key portions of integrated common-law property systems and thus compel total revision of those common-law property systems in order to keep the systems coherent.

Senator HATCH. Would the ERA require as a constitutional matter the community property-type system that we have in some of our Western States?

Ms. LEVICK. Again, I think that this is an academic question because the passage of equitable distribution laws in most States has essentially accomplished this.

Professor WARDLE. I believe that it would require community-property-like systems. I do not think any State would be compelled to adopt the community property system.

Senator HATCH. Ms. Levick, are you saying that the system has already been established.

Ms. LEVICK. The system has largely been established in most States through the principle of equitable distribution as well as the Uniform Marriage and Property Act which will also be accomplishing the same thing.

Senator HATCH. The ERA project suggests that even if community property laws were mandated by the amendment, such a change would be inadequate if it only dealt with property obtained by a spouse following the ratification of the ERA. Do you agree with their assessment on that?

Ms. LEVICK. I think there may be some due process considerations, though, that would have to be harmonized with the equal rights amendment.

Professor WARDLE. As we said before, that is a question of retroactivity, and we are not sure how it would be resolved but it could be resolved as the project suggests.

Senator HATCH. The ERA project states the remaining common-law dower or courtesy statutes will likely be unconstitutional under the ERA as well as existing forced share, or, nonbarrable, statutes which have effectively replaced dower rights. Do you agree with that?

Ms. LEVICK. I have to confess that I do not fully understand what those statutes provide for.

Senator HATCH. OK. What about you, Professor?

Professor WARDLE. Well, to the extent that those statutes do provide that a widow has some protection that a widower does not have, for instance, the creditors cannot reach a widower's share in property held by the entireties, then they would be sex discriminatory laws and they would be held to violate the ERA.

Senator HATCH. All right. The ERA project states that tenancy by the entirety forms of property ownership will be rendered unconstitutional under the ERA because they substantially inhibit the granting of credit to one spouse or the other and normally disadvantage the wife.

Would you agree with that statement? Would tenancy by the entirety become an unconstitutional form of property ownership by a married couple?

Ms. Levick. I would essentially offer the same answer that I offered on the common-law issue, and again, underscore the fact that this is largely already occurring in most States.

Professor Wardle. Yes, it is largely already occurring, but I think there are still two States that do have gender-based discrimination in entireties laws. They would be unconstitutional under the ERA.

Ms. Levick. I would agree with that.

Senator Hatch. Are you saying that the ERA would not effect any substantial changes in present property laws? Your earlier answer to my question on common-law property statutes seemed to suggest that it would.

Ms. Levick. What I am saying in the area of title and property to the extent that becomes significant in property distribution at the time of divorce, most States, either through the adoption of community property schemes or equitable distribution laws, have essentially effected a method for overcoming the discrimination that existed in common-law property.

Senator Hatch. So you would disagree with the study conclusion that these things would be changed?

Ms. Levick. Well, I think it is important to recognize that basically I guess it is about since 1980 or 1979 that we have seen the greatest development in family, and I know that many of the studies that have been done in this area, including some of the very early works on the ERA, have been written 10 and 12 years ago.

This is a very recent development and it is important to recognize that it has been that recent.

Senator Hatch. But then why would Marna Tucker have testified at the first hearing on this subject last year that she felt there would be many changes in property laws as a result of the ERA's ratification.

Ms. Levick. I do not disagree that there would be many changes required in property laws. I am only saying that many of them would be, to a certain extent, academic, because, in practice, much of what we are concerned about is already taking place.

Senator Hatch. Even in community property States, I would assume the laws treating men and women differently in such matters as management or the characterization of debts as separate or community would be in violation of the ERA. Am I correct on that?

Professor Wardle. Yes.

Ms. Levick. Yes.

Senator Hatch. Am I correct that anything that was determined to be unconstitutional under the ERA with respect to alimony generally would also be held unconstitutional with respect to alimony pendente lite, or alimony during the pendency of the divorce litigation?

Professor Wardle. Yes.

Ms. Levick. Yes, I think that is correct.

Senator HATCH. Would Federal immigration laws which treat differently the mothers and fathers of individuals in this country for purposes of immigration be unconstitutional under the ERA?

Ms. LEVICK. I am not familiar with how those laws discriminate between men and women.

Senator HATCH. Those immigration laws give preference to mothers but not to fathers in admission. Would not they be stricken?

Ms. LEVICK. They would probably be stricken, but again, I am not aware of the context in which it arises.

Senator HATCH. I would be happy to have you submit additional information to us if you decide later that your statement is not accurate.

Ms. LEVICK. Thank you.

Senator HATCH. Let me conclude by asking each of you several more questions. Now, these are largely philosophical questions about the impact of the equal rights amendment upon the traditional concept of the family in American law.

The National Conference of Catholic Women has said the following about the ERA: "The ERA would destroy the safeguards society has erected around the wife and the mother as the center of the family."

How would you respond to that concern, Ms. Levick?

Ms. LEVICK. I do not think that the equal rights amendment will, in any way, impair the traditional family. I think that what the equal rights amendment will do will enhance the rights and responsibilities of each member in the traditional family and insure that each individual member of the family has the right and the ability to pursue the particular course that they choose to pursue and not be penalized for doing that.

The way that our laws have traditionally operated in this country have been to essentially penalize the woman who chooses to be a homemaker once she finds herself in divorce and finds herself getting much less than she might otherwise be entitled to.

Senator HATCH. Professor?

Professor WARDLE. I agree with the Catholic Women's statement. That is the gravest concern I have, because it would purge the law and purge public policy of any presumption that favors or encourages the woman to assume a full-time role in the home, because that is a sex-based presumption, because it draws a distinction on the basis of sex.

Senator HATCH. Ms. Levick, you do not disagree that the ERA would purge the law of that particular presumption, do you?

Ms. LEVICK. I certainly disagree that it is a sex-based presumption. I think that there is nothing, there is absolutely no evidence that I am aware of or that I can point to, and there is nothing that has ever been expressed by the feminist community of which I am a part that has ever derided or ridiculed those women who choose to be homemakers. To the contrary.

And I really must take offense at the cartoon that Professor Wardle mentioned at the beginning of his statements here today. To the contrary. I think that the feminist community has really gone to great lengths to emphasize how important the equal rights amendment would be to really enhance and help women as homemakers in their ability to continue as homemakers. It is not at all about depriving them of that opportunity.

Senator HATCH. My impression was that Professor Wardle also took offense to the cartoon, in the sense that if it is true, it certainly is an offensive thing.

Ms. LEVICK. But I think it is a misperception.

Senator HATCH. That may well be.

Professor WARDLE. To the extent that the law provides any special benefit, exemption, or encouragement for women to be homemakers that it does not provide for husbands or men, it would violate the ERA.

Thus, it would purge public policy of any attempt to encourage or support women or to prefer women or give women special benefits who stay home and devote their full attention to raising children rather than entering the work force or pursuing other interests.

Ms. LEVICK. Let me just say, Senator Hatch, however, that I think it is a mistake here today to overly romanticize the notion of the woman as a homemaker. I am a little bit troubled that we are presenting a record here that suggests that women as homemakers have, in fact, received terrific preferential treatment and great benefits. What we know to be true is indeed the contrary. Women have not received preferential treatment and they have suffered in the role as a homemaker.

I think it is important, again, to recognize that the equal rights amendment will do a great deal to ameliorate their condition and not to harm it.

Senator HATCH. I will go to the next question. The California Commission on the Status of Women has said, "The ERA would nullify the existing marriage contract and encourage a redefinition of marriage." Is the commission's assessment accurate in that particular description?

Ms. LEVICK. I do not know what they mean by the existing marriage contract.

Professor WARDLE. Well, they can mean two things. One is it would encourage private contract without any State-supported assumption about sex-based roles, who will raise the children. And I would agree that that certainly is true.

Another thing it might mean and a very disturbing possibility is homosexual marriage. The very concept of marriage as a union between a man and a woman, persons of the opposite sex, may be held to be violative of the equal rights amendment.

There is simply no way of resolving that because there is very good authority and analysis that says the equal rights amendment will have that impact, require homosexual marriage in the States, and very good authority that says it will not.

Senator HATCH. Do you think it will require the legalization of homosexual marriage?

Ms. LEVICK. No, I do not. There is no precedent to suggest that the equal rights amendment would ever be interpreted in that way.

Professor WARDLE. There are only two cases I am aware of, one in Washington that said no, the State ERA would not hold that; and one in Pennsylvania just decided a couple of weeks ago in which they declined to reach the issue as to common-law marriage between homosexuals under the State ERA.

But I wonder what the analysis is. How can you say that a law—how do you pull this into either of the qualifications to the absolute rule prohibiting sex discrimination? A law that says I, a male, can marry a woman but I cannot marry a man. That a woman can marry me but a man cannot marry me. That law is clearly a sex discriminatory law. Now, how do you say that that will be upheld? I think it should be upheld. I think homosexual marriage should not be required.

But I am concerned how you make the argument that under the ERA it would not be prohibited.

Senator HATCH. Well, let me ask you this. You represent the NOW Legal Defense and Education Fund. Suppose two homosexuals came to you and said, "The equal rights amendment has been ratified. I want you to take my case as part of your responsibilities for the defense fund. We think that the equal rights amendment protects our rights to marry each other and enjoy the accompanying rights and privileges that marriage allows."

Ms. LEVICK. It is our position that the equal rights amendment does not reach discrimination on the basis of sexual preference.

Senator HATCH. Barbara Babcock said, "The effect that the ERA will have on discrimination against homosexuals is not clear. It is hard to justify a distinction between discrimination on the basis of the sex of one sexual partners and other sex-based discrimination." Do you agree?

Ms. LEVICK. I think that what the equal rights amendment would address would be discrimination between homosexuals, that treated homosexuals differently from one another, but I do not think that it would reach the issue of homosexual marriage.

Senator HATCH. I just do not see how that can be if you are treating a man or woman differently simply because of their sex.

Professor WARDLE. The argument results from the Supreme Court's decision in *Loving* v. *Virginia*. In that case, there was a Virginia statute that prohibited interracial marriage. The Supreme Court said that that was unconstitutional, that you cannot say that a man can marry one woman but not another on account of her race.

Now, if you apply that same logic and substitute sex for race, and say that a man can marry one person but not another because of the sex of the second person, you have the analogy to *Loving* v. *Virginia*.

Now, I do not think that that is prudent, and I do not think it is the best analysis, but it is an analysis that has been supported, in fact, in the same law journal that published Brown, Emerson, Falk, and Freedman's classic law review article on the equal rights amendment. Two years later the same Yale Law Journal published a note that suggested that under the ERA homosexual marriage would have to be permitted in all the States.

Senator HATCH. Ms. Levick, what would be the impact of the ERA on homosexual rights generally?

Ms. LEVICK. Well, the point that I tried to make earlier was that any kind of discrimination that treated female homosexuals differently from male homosexuals would constitute sex discrimination under the equal rights amendment.

I will reiterate, however, that I do not believe that it would reach the issue of homosexual marriage. I would also just like to say, however, that I also know that this committee did hold a full day of hearings on the issue of homosexuality and not having come here as an expert to testify on the issue, I think I would like to limit my comments to that.

Senator HATCH. All right. Let me read you another quote from the California Commission on the Impact of the ERA:

> Women will become much less ambivalent about their roles when they are expected to provide both partial economic and partial emotional support for their children. When women are convinced that mothering is a learned behavior they will begin to feel much more comfortable about choosing to forgo the role entirely. The form of the family may change. Probably there will be much more variability in the composition of the unit so the family will not mean nuclear family but any group of people living together and cooperating in an economic and affectional unit over a period of time. Perhaps the old nuclear family will still prevail, perhaps not.

The commission concludes by observing that the ERA ". . . might dispel the idea that the nuclear family must provide all care for children and deal with problems individually. This could pressure the community into being responsible for children."

Do you agree with this analysis? What does it mean in your opinion?

Ms. LEVICK. Well, I think that the debate that has come about as a result of the equal rights amendment in the last 10 or 12 years has already resulted in an enormous change in the way in which women perceive their roles and the way in which they perceive their roles both in the family and in the workplace.

However, I have not seen any evidence that those changes have resulted in a dissolution of the nuclear family. I think that it is really inaccurate and highly speculative to suggest that the equal rights amendment will spell the doom of the nuclear family and create some kind of new family relationships that we do not know about.

As I have said before, what the equal rights amendment will do is promote an equality between the parties to marriage and that that will be a beneficial aspect to the members of that family and not a detrimental one.

Professor WARDLE. I agree that the equal rights amendment debate has stimulated a lot of long needed change and reform in the area of family law which I have welcomed and which I support.

Senator HATCH. And which many opponents of the equal rights amendment welcome and support and have been fighting for for years.

Professor WARDLE. That is correct.

Senator HATCH. It is not necessarily the ERA that is bringing this about, is it?

Professor WARDLE. But it does more than that. It, I believe, would reduce the public reinforcement for traditional family as we know it in the country.

Senator HATCH. Let me ask you one final question, Ms. Levick. Are you telling me that the ERA, despite what the ERA project states, will effect absolutely no requirement that common-law property States adopt community property laws?

Ms. LEVICK. Well, I would agree really in what Professor Wardle said. I do not think that the equal rights amendment will require that States adopt any particular kind of laws. I think that what the equal rights amendment——

Senator HATCH. Let us talk in general terms then.

Ms. LEVICK. What it will require will be that distribution of property at the time of divorce and the allocation of ownership and management of property during marriage would have to be done on a sex-neutral and equal basis. To the extent that community property is one way in which that notion of equality has been implemented, that is one method to look at.

I think that this is a very good example of the way in which the equal rights amendment would not prohibit States from continuing to experiment and to use trial and error to look at other property schemes that might achieve the same form of equality.

Senator HATCH. Do the existing laws in the 50 States meet your requirements of equality?

Ms. LEVICK. There are many States in addition to the eight States that have community property schemes that have adopted equitable distribution laws that do reflect this principle of equality.

Senator HATCH. Professor?

Professor WARDLE. The statement that you read in your last question I think gets to the heart of the problem. It referred to the fact that mothering skills are entirely learned. And the assumption that will be written into the law, if the equal rights amendment is enacted and if it is given the interpretation that the proponents that I have read want it to be given, is that all difference between men and women, except for physical differences, are learned differences and the law cannot take account of those differences. That would destroy assumptions and presumptions that have supported and reinforced traditional mores and which have encouraged homemaking, would encourage men to support their families as a primarily responsibility and that, I think, is of grave concern.

Senator HATCH. I want to thank both of you for being here today. It has meant a lot to me to be able to go through this particular area of law, and I think both of you have spoken articulately and intelligently about this subject.

We will hold our next hearing in early August. I would like to ask the representatives of the feminist community who have been choosing the proponent witnesses to have their selection for witness at least 2 weeks in advance of the hearing.

Ms. Levick, you have been an excellent witness, and I think an excellent choice by the community, and I am very happy to have you come.

But, I really believe we deserve to know for certain who the witness is going to be 2 weeks before the next hearing. I did not know you were going to testify until just a few days ago when I got a letter from Senator Leahy, Senator DeConcini, and Senator Kennedy.

We accommodated them, but I am not sure I am going to do that in the future. These are important hearings. This committee deserves to know who is going to testify well in advance because it takes a great amount of preparation to cover what really is a very difficult set of subjects. I want to do it in a fair and reasonable way and frankly, I would be very happy to have Senators who are proponents at these hearings asking any questions they want to ask.

But I think my questions have been fair. I think they have covered a lot of areas that are important and that concern both sides of this issue.

I just want to, again, compliment both of you. I think our witnesses by and large throughout this set of hearings have been excellent, and I believe when we get through with all the hearings that we intend to conduct that we will have pinned down a great deal of what the ERA means and does not mean. And, where we do not know what it means we will be able to point many of those areas out.

So with that, we will recess this committee until further notice.

[Whereupon, at 11:57 a.m., the subcommittee recessed at the call of the Chair.]

[The following was received for the record:]

MISCELLANEOUS MATERIAL

[From the Wall Street Journal, July 31, 1984]

DIVORCING US FROM THE STATE-DRAWN MARRIAGE

(By Roger Arnold)

Societies based on status relegate persons to certain positions because of who they are (usually from birth), thus shackling their aspirations. Societies based on freedom to contract, such as is largely the case in the U.S., allow individuals to set the parameters within which they live their lives. The traditional state-imposed marriage contract is a notable exception to this country's general rule, one that it happens the Equal Rights Amendment would eliminate.

The marriage contract is built upon status. It sets certain behavioral patterns for a man, just because he is a man, and does likewise for women. In so doing, it prevents different men and women from legally structuring their marriage in ways suitable to them. In short, when it comes to marriage, there is essentially one contract all parties must enter into.

For example, the present marriage contract holds the husband to be the legal head of the family and thus confers certain privileges and responsibilities upon him. He can decide where he and his wife will live (privilege), but he also is supposed to provide for his wife's welfare (responsibility). In 1974, a Pennsylvania court found a wife guilty of desertion for choosing not to live with her husband in his chosen domicile. The court said that the wife's behavior "flies in the face of everything sacred which decrees that the husband must choose the domicile and the wife must conform thereto." Also, in '75, Louisiana's Supreme Court said "that only husbands are liable for criminal nonsupport . . ."

The wife also has certain privileges and responsibilities. She is due support from her husband, which can be seen as a special privilege. On the other hand, a husband today can much more easily and successfully sue his wife for "loss of consortium" (companionship, assistance and sexual relations) than his wife can sue him.

Most contracts have provisions outlining privileges and responsibilities, but unlike the marriage contract those provisions are drawn up and explicitly agreed to by the persons who actually must live by the contract's terms. Two persons wishing to be legally married in our society, whether out of hallowed tradition or merely for the sake of propriety, cannot set the terms.

But there is more. Most married persons do not even know the terms of their contract until it is too late. This causes a lot of frustration when a divorce is sought, and leads to a waste of time and money—especially in property settlements.

Consider one hypothetical example. Suppose after two years of marriage John decides to quit work and attend medical school. Sharon, his wife, decides to take on a second job to help meet the bills. After John becomes a doctor, the two decide to divorce. Sharon sues John for part of the present value of his medical degree. She argues that the medical degree is property that she helped John acquire in hopes of a better life.

But so far, courts have been hesitant to call a degree "property." Had Sharon known what the marriage contract "says" on such a matter—knowing that she probably would not be able to capture a return on the medical degree in case of a divorce—and if there were no other considerations, she might have acted differently.

And even if Sharon had, at the time John went to medical school, actually got John to sign a contract stating he would (in the case of a divorce) pay her so much for helping put him through medical school, there is no guarantee that that contract would have been binding at the time of divorce. There are numerous cases where courts have deemed unbinding the private contracts made between marriage partners because those contracts did not mesh with the marriage contract.

Enter the Equal Rights Amendment. By making it unconstitutional for men or women to have certain legal privileges and responsibilities merely based on sex, it would immediately puncture the status-oriented, state-imposed marriage contract. Then, one of two things would happen. Either a new, state-imposed, non-status-oriented contract would be created or individuals who choose to marry would be free to set the terms of their marriage contract. In the latter (but more unlikely) result the persons getting married would form their own contract. There would then be less uncertainty as to its terms and probably fewer marriages would go awry.

This is not to be taken as a blanket endorsement of the Equal Rights Amendment. The ERA should be looked at in terms of its other possible effects. But in likely dissolving the status-ridden state marriage contract it would make a definite move toward greater individual freedom.

[From the Wall Street Journal, Aug. 14, 1984]

MARRIAGE RITES DON'T CANCEL RIGHTS

Prof. Roger Arnold is mistaken in declaring (editorial page, July 31) that "the traditional state-imposed marriage contract" does not "allow individuals to set the parameters within which they live their lives." Prof. Arnold incorrectly asserts that there is "essentially one contract all parties [to a marriage] must enter into." On the contrary, the economic consequences of marriage may be freely negotiated and covered by enforceable contracts in most jurisdictions in the U.S.

As the Supreme Court of Minnesota stated as early as 1907, antenuptial agreements "are matters of history and have been upheld and sustained by the courts from the earliest times." Actually most courts in the U.S. have extolled the advantages of antenuptial agreements and in recent years our state courts have enlarged the permissible scope of the agreements. Indeed, in a 1982 case, the Maryland Court of Special Appeals held that that state's equal rights law precluded a presumption of a confidential relationship between spouses, refusing to set aside a separation agreement on that ground. The trend in most jurisdictions, whether or not there is a state equal rights law, is to enforce such agreements even when they include detailed provisions for spousal support or termination of spousal support upon dissolution of the marriage.

Public policy restrictions on some provisions in antenuptial agreements are disappearing in favor of broad freedom of contract as a result of the dramatic changes in marriage, divorce and marital property. Moreover, while some writers have referred to marriage as "a status," since Blackstone (1860) called marriage a "civil contract" most scholars have emphasized the difference between the legal consequences of marriage and ordinary contracts because of the unique character of the marital relationship.

Mr. Arnold's silly illustrations are historical vestiges. In most jurisdictions, wives are no longer treated as deserters if they refuse to follow their husbands, but may freely reside in any state regardless of the husband's domicile. Moreover, jurisdiction after jurisdiction has de-sexed its marriage and divorce laws, holding that it would constitute a denial of equal protection to limit contempt penalties for non-support to one sex.

On the other hand, both parents, regardless of gender, have an obligation to provide for their children. It is a matter of public policy throughout the Western world that this obligation to minors may not be bargained away by adults, notwithstanding that they are otherwise free to negotiate economic consequences of marriage.

Mr. Arnold makes no mention of the rapid growth of nonmarital cohabitation. Most state courts that have considered the matter in recent years have upheld or indicated they would uphold express nonmarital conhabitation agreements such as the model agreements we proposed in Green & Long's "Marriage and Family Law Agreements" (Shepard's/McGraw-Hill, 1984).

While I am a supporter of ERA as a matter of high moral and political principle, it is surely not needed to establish the validity of antenuptial and nonmarital cohabitation agreements.

JOHN V. LONG.

Bethesda, Md.

The article by Roger Arnold was based upon legal assumptions that have not been valid since the 1979 U.S. Supreme Court case Orr v. Orr. Arnold states that marriage gives husbands and wives different rights and duties, that wives essentially must do what husbands say, and that husbands must support wives. He says the ERA would change this.

The Supreme Court already changed it. Orr held that husbands and wives are equally liable for alimony and support, under the 14th Amendment. As a result, states which had not yet desexed marriage laws to provide equal rights and duties (many already had) have been forced to do so. Even Georgia, which was backward enough to leave a "husband is head of the household law" on the books until this past year, desexed domestic relations laws.

Furthermore, alimony is getting rare in two-wage-earner families, anyway. More fathers are getting child custody. Many states abolished alienation of affection laws. And while a degree from a college is not (or should not be) considered property to divide in a divorce, future earning capacity is routinely looked at in setting support.

People who get married today do not give up any contractual rights and they know fairly well what from a legal standpoint they have entered into. People divorce not because they learn about what a marriage contract is but because they do not get along.

GLEN EDWARD ASHMAN.

East Point, Ga.

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: EXCEPTIONS

TUESDAY, AUGUST 7, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room SD-430, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Present: Senator Thurmond.

Staff present: Dick Bowman, Committee on the Judiciary; Stephen J. Markman, chief counsel and staff director; and Carol Epps, chief clerk, Subcommittee on the Constitution.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Ladies and gentlemen, this marks the 10th day of hearings by the Subcommittee on the Constitution on the proposed equal rights amendment. As with each of our earlier hearings, the principal purpose of this afternoon's hearing will be to determine the real world impact of the proposed 27th amendment to the U.S. Constitution.

As this subcommittee nears the end of its exploration of the ramifications of the equal rights amendment, I believe we have been successful in creating a fair and comprehensive record which will ensure that Members of Congress, and perhaps members of State legislatures, will vote on this amendment with a better understanding of its impact on public policy.

Today's hearing will focus largely, although not exclusively, upon the subject of exceptions to the rule of equality contained in the ERA. In particular, it will consider two often mentioned exceptions by proponents of the amendment: One relating to what is described as a "right to privacy," and the other relating to what is described as the "unique physical characteristics" exception.

Many proponents of the amendment argue that there are exceptions inherent in the amendment whenever a public policy involves one of these factors. We hope to explore the scope of these exceptions today.

As with our earlier hearings, we will hear testimony from a panel of two experts. Our witnesses today will be Prof. Jules Gerard and Prof. Catherine Zuckert. We very much appreciate their taking time from their schedule to be with us today and look forward to hearing their testimony.

At this time we would like to call both Mr. Gerard and Mrs. Zuckert to the witness table. Professor Gerard is professor of law at Washington University. He is one of the Nation's most distinguished constitutional scholars and has often appeared before this committee.

Catherine Zuckert is professor of government at Carleton College in Minnesota where she teaches the subject of sex discrimination in the law. She has widely published and printed many articles on women and the law.

We're very grateful to welcome both of you before the committee this afternoon.

Before we begin, however, I would like to turn to the distinguished Senator from South Carolina, the chairman of the full Judiciary Committee, Senator Thurmond, to see if he has any opening remarks.

STATEMENT OF SENATOR STROM THURMOND

The **CHAIRMAN**. Thank you very much, Mr. Chairman. I do not have any opening statement. I am very pleased to be here. I have to leave to hold my hearing at 2:15, but I want you to know of my deep interest in this matter and my desire to cooperate with you.

Senator **HATCH**. Thank you so much, Senator, and we surely appreciate your interest in the matter as the chairman of this committee.

Mrs. Zuckert, we will start with you and we will be happy to take your testimony at this point.

STATEMENTS OF PROF. CATHERINE ZUCKERT, CARLETON COLLEGE, NORTHFIELD, MN, AND PROF. JULES GERARD, WASHINGTON UNIVERSITY SCHOOL OF LAW, ST. LOUIS, MO

Mrs. **ZUCKERT**. Thank you, Mr. Chairman. I am honored to be asked to testify before you this afternoon. Although I am here primarily as a professional student and teacher of American politics, I am also a women who has greatly benefited from the vastly expanded opportunities extended to women in the last two decades. Not only for my own sake, but also for the sake of my students and my three daughters, I cannot but wish to see women guaranteed equal rights now and in the future. The notion that every individual ought to have the opportunity to develop his or her specific talents without regard to sex is so fundamental to current American notions of justice, I believe, that it ought to be enshrined in the Constitution. I cannot but be concerned, even saddened, therefore, when it appears that insistence upon the currently proposed language makes it unlikely that any such amendment to the Constitution will be ratified in the foreseeable future.

The question immediately before the subcommittee is whether Congress should resubmit exactly the same language for ratification by the State legislatures. The answer to that question must be no.

Reconsideration of an equal rights amendment ought to take place in light of two very important developments since Congress first proposed the amendment in 1972. The first such development is the failure of the currently proposed language to secure ratification by the necessary three-fourths of the State legislatures. Serious opposition has obviously arisen to the current proposal and ratification does not appear likely unless the objections are somehow met.

The objections to the ERA do not appear to be to the principle, the desirability of securing equal rights for women, however. For example, the currently proposed language did not fail in the House because more than a third of our Representatives oppose equal rights for women. The currently proposed language failed because the sponsors refused to consider any amendments to or changes in its absolutist wording. The first question recent history raises, therefore, is why proponents of the ERA have not sought to meet or at least to mollify some of the concerns of their opponents by changing the language of the proposed amendment. The language currently proposed dates, after all, from the early 1940's when a congressional committee modified the language the women's party had proposed every year since 1923 in an attempt to make it a bit more moderate.

Both the country and constitutional law have changed significantly in the meantime; and one wonders whether the language of the proposed amendment ought not to reflect these changes. Is there not language that will respond to the concerns of the critics of the currently proposed amendment without severely compromising the equality proponents adamantly desire?

The answer to that question lies, I believe, in the second major development of the last two decades. Where the attempt to ratify the ERA failed, both Congress and the Supreme Court have succeeded in massively extending the legal rights of women by using a more limited standard. Unlike the language currently proposed, an amendment incorporating the current legal standard would allow certain exceptions to the general presumption against sex-based discrimination. The question to which this particular hearing is addressed, indeed, is the status or desireability of such exceptions.

Should the Constitution absolutely bar legal distinctions on the basis of sex, as the present wording mandates, or should we create a strong constitutional presumption against sex-based distinctions? Should distinctions on the basis of sex be allowed when, but only when, it has been shown that such distinctions are substantially related to important governmental objectives, to use the language currently employed by the court?

Several critics of the currently proposed amendment have objected to it on the grounds that it is vague. The problem with the currently proposed language is not so much that it is vague, I submit, as that it is so absolute. Equality of rights under law shall not be abridged or denied on account of sex means simply that any legal right, that is, any claim, benefit, or immunity, granted by law to members of one sex must be granted to members of the other sex similarly situated.

The difficulty with the currently proposed language is not that it is unclear, therefore, but that the prohibition of any legal recognition of any difference between the two sexes flies in the face of fact. There are physical, social, or stereotypical, and economic differences between the sexes, and taking account of such differences is sometimes necessary in order to achieve important public goals, including, ironically, the securing of equal opportunity for women.

Some proponents of the current language argue, therefore, that it would allow the law to take account of unique physical characteristics. But if it is legitimate to take account of physical differences with regard to reproduction, the discrimination we are concerned about is not literally discrimination on account of sex.

If we are trying, rather, to prevent discrimination on the basis of archaic stereotypes and overbroad generalizations, the wording of the amendment ought to be changed to make that clear. As it stands, the currently proposed amendment does not allow any exception on the basis of unique physical characteristics; rather, the words categorically proscribe any differential treatment on account of sex. And I do not know what sex means if it does not refer to differences of reproductive functions and organs.

The problems with an absolute prohibition of distinctions of the basis of sex become even clearer, I believe, in discussions of affirmative action or other compensatory programs designed to help women overcome their obvious economic disadvantages. If the currently proposed language were added to the Constitution, it would certainly be difficult to defend a policy mandating preferential hiring or any other particular benefits or immunities to women because men would be perfectly justified in complaining that they had been denied jobs or places in schools on account of sex. Yet one of the major reasons people are concerned about sex-based discrimination and want an equal rights amendment continues to be the disparity between sexes in average wages. It would be truly ironic if the amendment intended to remedy this disparity made policies intended to counteract the effects of past discrimination unconstitutional.

The difference between a policy seeking to assure equal treatment of the two sexes and a policy mandating the abolition of all distinctions on the basis of sex may be seen most clearly, however, in the controversy surrounding the status of separate but equal athletic programs. Under title IX, women have made tremendous gains in both physical fitness and athletic competition, but they have done so largely in the context of women's teams. Biological differences are apparently very significant in athletic performance. No American woman—and this is the week to say it—would have made the Olympics, for example, if the team had been integrated and the same criteria for selection applied without regard to sex. Under the currently proposed amendment, it would be difficult to deny the right of any male to compete for a place on a formerly all women's team, even though such competition would probably result in two predominantly male teams. Sexual distinctions in the organization of school athletic teams are, on the other hand, allowable under current law.

It proves useful, indeed, to look further at the provisions of title VII of the 1964 Civil Rights Act and title IX of the Education Amendments of 1972 in considering the implications of an absolute prohibition of distinctions on account of sex because both title VII and title IX allow certain explicit exceptions which would presumably be disallowed under the general language of the currently proposed amendment. For example, title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." Schools which have "traditionally and continually had a policy of admitting only students of one sex" are also excluded. Maintaining Orthodox Jewish seminaries or private women's colleges is not a problem under current law, therefore, but both would become so under the currently proposed amendment. Yet such eminent sociologists as David Riesman and Christopher Jencks have argued that single sex education may be particularly beneficial in enabling women to achieve to positions of leadership and authority.

Most of the controversy surround the effects of the currently proposed language concerns military service and public funding of abortions, however. When Congress decided in 1980 to limit registration for the draft to males, the Senate Armed Services Subcommittee on Manpower and Personnel reported:

> The principle that women should not intentionally and routinely engage in combat is fundamental and enjoys wide support among our people. It is universally supported by military leaders who have testified before the committee. . . . In addition to the military reasons which the committee finds compelling, witnesses representing a variety of groups testified before the subcommittee that drafting women would place unprecedented strains on family life.

Since the language of the currently proposed amendment would surely mandate the registration and drafting of women whenever the law requires registration and drafting of men and would also proscribe the combat restriction, it is no wonder this language has encountered serious opposition. It runs directly counter to public opinion.

By way of contrast, current court doctrine does not require either drafting or putting women in combat positions because national defense is clearly an important governmental objective to which distinctions on the basis of sex are substantially related. But it is perhaps also important to note that the court's decision would not prevent Congress from drafting women or putting them in combat positions should that prove desirable. It is not as if there are no women serving in the military right now. The question is, thus, not whether women may serve in the military. The question is rather whether we must register and perhaps draft all women of an eligible age, whether or not the armed forces can effectively use them, as a matter of principle without regard to cost, efficiency, or current public sentiments.

Proponents of the currently proposed amendment argue that women will not be regarded as full or equal citizens until they assume the most arduous duty of citizenship, which is military service. Military service does not constitute the primary definition of full citizenship in a modern, liberal democracy, however; voting does.

Military service has, to be sure, been used as a justification for giving certain people voting rights. One of the most powerful arguments in favor of lowering the voting age to age 18 was the assertion that a man old enough to fight for his country was old enough to have a voice in deciding whether the Nation ought to go to war. Having gained the vote in 1920 with the 22d amendment, women do not need compulsory military service in order to become full citizens.

The abortion question has probably proved even more deadly to the currently proposed language than the draft. Is it merely coincidental that serious opposition to the ERA developed in 1973, the year the Supreme Court declared a woman had the right to have an abortion during the first trimester of a pregnancy in *Roe* v. *Wade*?

The right to life groups which have emerged in reaction to the Supreme Court's decision in *Roe* have not as yet mustered enough support to pass their own constitutional amendment prohibiting abortions entirely. But they do seem to have enough popular and legislative backing to block the currently proposed ERA. Critics of the current proposal thus have a powerful point when they argue that the current language would mandate public funding for abortions. Both the United States and States participating in the Medicaid Program grant indigent people a right under law to medical care, which would, if not extended to abortions, be denied on account of sex. In order to separate the ERA from the pro-choice, pro-life controversy, as many advocates think it should be, it will, therefore, be necessary to change the language.

If the approach taken by Congress and the court is superior to the currently proposed amendment, you might well ask, why amend the Constitution at all. Why not just leave things as they are?

There are, I believe, two reasons. First, the ERA has always had primarily a symbolic meaning. Although a constitutional amendment is not merely or simply a symbol—the specific language is very important, as I have argued—the Constitution is also more than a legal code, as Chief Justice Marshall proclaimed so eloquently in *McCullock* v. *Maryland*, the Constitution states the fundamental principles of our Government and thereby teaches and reaffirms the people's deepest notions of what is just. An amendment affirming the presumption against sex-based discrimination embodied in current law would not affect the social revolution some of the more extreme advocates of women's liberation hope for. It would certainly not do away with marriage or the family; but it would represent an important step, indeed, a decisive step in achieving public recognition of the equal rights and status of women in the United States of America. And for this there seems to be overwhelming public support.

Without a more moderate substitute, on the other hand, defeat of the current proposal is apt to be interpreted as a setback, perhaps even as an indication of loss of popular support for equality of rights for women, producing a real setback as well. Congressional legislation can and indeed should reflect changes in public opinion. And the Supreme Court has also been known to change its mind. A constitutional amendment would, therefore, provide a much firmer, more lasting basis for the guarantee of equal opportunity to women than either congressional legislation or court decisions alone. Nor would appropriate language be difficult to find. It is not necessary to mess up the amendment or the Constitution with a list of exceptions.

The subcommittee could propose language reflecting current court doctrine. For example, neither the United States nor any State may distinguish persons on the basis of gender unless such distinction be shown to be substantially related to an important governmental objective.

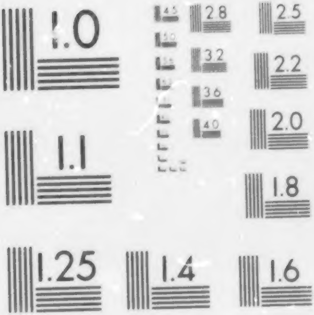
Second, the court desperately needs a statement of legislative intent and popular will to support and clarify its current holdings. When the Supreme Court decided in 1971 to subject sex-based distinctions in the law to stricter scrutiny than they had in the past, the Justices acted against 100 years of precedent and the probable intention of the framers of the 14th amendment.

Although *Reed* v. *Reed* was a unanimous decision, the members of the current court have not been able to agree on the applicable standard or the reasons for their subsequent holdings. Many cases have been decided on a 5-4 vote with disagreement among the members of the majority about the reasons for the decision.

In light of the inability of a stable majority of the current court to determine what exactly constitutes invidious discrimination or when exactly members of the two sexes are or are not similarly situated, the fact that six of the present Justices are more than 70 years of age and hence soon likely to retire, also becomes very significant. With no agreed upon doctrine or rationale to guide them, new appointees are apt to come to their own new, different and in any case unpredictable reading of the 14th amendment. Partly because Congress quite properly waited for the State legislatures to ratify the ERA, there has already been too much "judge made" law in this area.

A statement of legislative and popular intent in the form of a constitutional amendment embodying the current Court's standard would do a great deal to strengthen and to clarify the law with regard to the status and rights of women in America.

[The prepared statement of Mrs. Zuckert and a letter to Senator Hatch follow:]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NATIONAL BUREAU OF STANDARDS
STANDARD REFERENCE MATERIAL 1010a
(ANSI and ISO TEST CHART No. 2)

Testimony
of
Catherine H. Zuckert
Department of Political Science
Carleton College, Northfield MN
before the
SUBCOMMITTEE ON THE CONSTITUTION
of the
SENATE COMMITTEE ON THE JUDICIARY
August 7, 1984

Mr. Chairman and members of the subcommittee:

I am honored to be asked to testify before you this afternoon. Although I come before you primarily as a professional student and teacher of American politics, I am also a woman who has benefitted from the vastly expanded opportunities extended to women in the last two decades. Not only for my own sake but also for the sake of my students and my three daughters, I cannot but wish to see women guaranteed equal rights, now and in the future. The notion that every individual ought to have the opportunity to develop his or her specific talents, without regard to sex, is so fundamental to current American notions of justice, I believe, that it ought to be enshrined in the Constitution. I cannot but be concerned, even saddened, therefore, when it appears that insistence upon the currently proposed language makes it unlikely that any such amendment to the Constitution will be ratified in the foreseeable future.

The question immediately before the subcommittee is whether Congress should re-submit exactly the same language for ratification by the state legislatures. The answer to that question must [redacted] be, no. 1984 is not 1972. Reconsideration of an equal rights amendment ought to take place in light of two very important developments during the intervening years.

The first such development is the failure of the currently proposed language to secure ratification by the necessary three-fourths of the state legislatures. After thirty states rushed to ratify the amendment within the first year, the process came to a virtual halt. No state legislature ratified the proposed amendment during the three year extension period Congress granted in 1979, and five of the thirty-five states that had ratified sought to rescind their previous action. Congressmen and Senators anxious to sponsor the amendment a second time may thereby express their good intentions, but their sponsorship threatens to become a rather futile gesture. Serious opposition has obviously arisen to the current proposal, and ratification does not appear likely unless the objections are somehow met.

The objections to the E. R. A. do not appear to be to the principle, the desirability of securing equal opportunity for women, however. The currently proposed amendment did not fail to achieve the necessary two-thirds majority in the House of Representatives last November, for example, because more than a third of our Congressmen oppose the guarantee of equal rights for women; the currently proposed amendment failed because the sponsors refused to consider any amendments to or changes in its absolutist wording. The first question recent history raises, therefore, is why proponents of the E. R. A. have not sought to meet or at least to mollify some of the concerns of their opponents by changing the language of the proposed amendment slightly. The language currently proposed dates, after all, from the early 1940's when a Congressional commitee modified the language the Women's Party had proposed every year since 1923 in an attempt to make it a bit more moderate. Both the country and constitutional law have changed significantly in the meantime, moreover, and one wonders whether the language of the proposed amendment ought not to reflect these changes. Isn't there language that will respond to the concerns of the opponents of the currently proposed amendment without severely compromising the equality proponents adamantly ~~desires~~ desire?

The answer to that question lies, I believe, in the second major development of the last two decades. Where the attempt to ratify the E. R. A. failed, both Congress and the Supreme Court have succeeded in massively extending the opportunities of women by using a more limited standard. As a result of both Congressional legislation and Supreme Court decisions, the presumption is now against discrimination on the basis of sex. Congressional legislation and Court decisions thus point to a practical standard and acceptable wording. Unlike the language currently proposed, such an amendment would allow certain exceptions to the general presumption against sex-based discrimination. The question to which this particular hearing is addressed, indeed, is the status or desirability of such exceptions. Should the Constitution absolutely bar legal distinctions on the basis of sex, as the present wording mandates; or, should we create a strong constitutional presumption against sex-based distinctions? Should distinctions on the basis of sex be allowed when, but only when it has been shown that such distinctions are "substantially related to an important governmental objective," to use the language currently employed by the Court?

Several critics of the currently proposed amendment have objected to it on the grounds that it is "vague." The problem with the currently proposed language is not so much that it is vague, I submit, as that it is so absolute. "Equality of rights under law shall not be abridged or denied on account of sex" means simply that any legal "right," that is, any claim, benefit, or immunity granted by law to members of one sex must be granted to members of the other sex, who are otherwise similarly situated.

The difficulty with the currently proposed language is not that it is unclear, therefore, but that the prohibition of any legal recognition of any difference between the two sexes flies in the face of fact. There are physical, social or "stereotypical", and economic differences between the sexes; and taking account of such differences is sometimes necessary in order to achieve important public goals, including, ironically, the securing of equal opportunity for women.

Some proponents of the current language argue, therefore, that it would allow the law to take account of "unique physical differences." If it is legitimate to take account of physical differences with regard to reproduction, however, the discrimination we are concerned about is not, literally, discrimination "on account of sex." If we are trying, rather, to prevent discrimination on the basis of "archaic stereotypes and overbroad generalizations," the wording of the amendment ought to be changed to make that clear.

Here again the experience of the last two decades reveals some of the problems with the currently proposed wording. When the Supreme Court first had to determine whether differential treatment of pregnancy as a disability was contrary to the prohibition of discrimination on the basis of sex in Title VII of the 1964 Civil Rights Act, they decided that it was not. Special treatment of pregnant women did not constitute sex-discrimination, the Court argued, because it did not involve a distinction between men and women; the distinction was rather between pregnant and non-pregnant persons and women are, obviously, non-pregnant persons much of the time. (*General Electric Co. v. Gilbert*, 429 U. S. 125.) Congress responded to the Court's interpretation by amending the law to make it clear that discrimination on the basis of sex included discrimination on the basis of pregnancy. It is obviously much easier for Congress to change the Court's construction of a statute than it is to alter the wording of a constitutional amendment once adopted. *Perhaps* the Court would interpret the currently proposed language in terms of the Congressional revision of Title VII, but it surely would be better for Congress to state what it means as precisely as possible in the amendment itself. As it stands, the currently proposed amendment does not allow any exception on the basis of "unique physical characteristics." Rather, the words categorically proscribe any differential treatment on account of sex; and I do not know what "sex" means if it does not refer to differences of reproductive functions and organs.

The problems with an absolute prohibition of distinctions on the basis of sex become even clearer, I believe, in discussions of affirmative action or other compensatory programs designed to help women overcome their obvious economic disadvantages. Proponents of the current language have argued that affirmative action would be allowable, because the Court would interpret the language in light of the "intention" of the amendment to help women. Although race is a "suspect classification" under the current Court's reading of the 14th Amendment, they point out, the Court has allowed racial distinctions in the form of quotas for remedial purposes. If we can rely on Court interpretation of the equal protection clause to secure equal opportunity for women, however, the case for a constitutional amendment would appear to dissolve. If the current language were added to the Constitution, it would certainly be difficult to defend a policy mandating preferential hiring or any other particular benefits or immunities to women, because men would be perfectly justified in complaining that they had been denied jobs or places in school "on account of sex." Yet one of the major reasons people are concerned about sex-based discrimination and want an equal rights amendment continues to be the disparity between the sexes in average wages. (Women still earn only half what men do.) It would be truly ironic if the amendment intended to remedy this disparity made policies intended to counteract the effects of past discrimination unconstitutional. If Congress intends to create a presumption against sex-based discrimination, but to allow distinctions on the basis of sex for some limited purposes, like remedying the effects of past discrimination, the language of the proposed amendment ought to communicate that intention more clearly. It should not proscribe all distinctions "on account of sex" as it does at present.

The difference between a policy seeking to assure equal treatment of the two sexes and a policy mandating the abolition of all distinctions on the basis of sex may be seen most clearly, however, in the controversy surrounding the status of "separate but equal" athletic programs. Under Title IX women have made tremendous gains in both physical fitness and athletic competition, but they have done so largely in the context of women's teams. Biological differences are apparently very significant in athletic performance. No American woman would have made the Olympics, for example, if the team had been integrated and the same criteria for selection applied without regard to sex. Under the currently proposed amendment, it would be difficult to deny the right of any male to compete for a place on a formerly all-women's team, even though such competitions would probably result in two predominantly male teams. Sexual distinctions in the organization of school athletic teams are, on the other hand, allowable under current law. To be sure, sexual distinctions are permitted, under the Court's current reading of the equal protection clause, only if they can be shown to be substantially related to an important governmental objective. Since "team play," "sportsmanship," and general physical development are all important parts of an individual's education, and public education is certainly an "important governmental objective," it is relatively easy to justify sex-segregated teams as means of providing equal educational opportunity (in the absence of a state E. R. A.)

Indeed, it proves useful to look further at the provisions of Title VII of the 1964 Civil Rights Act (which prohibits discrimination in employment) and Title IX of the Education Amendments of 1972 (which prohibits discrimination in educational admissions and programs), in considering the implications of an absolute prohibition of distinctions "on account of sex," because both Title VII and Title IX allow certain explicit exceptions which would presumably be disallowed under the general language of the currently proposed amendment. For example, Title IX "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." Schools which have "traditionally and continually . . . [had] a policy of admitting only students of one sex" are also excluded. Maintaining orthodox Jewish seminaries or private women's colleges is not a problem under current law, therefore, but both would become so under the currently proposed amendment. Yet, such eminent sociologists as David Riesman and Christopher Jencks have argued that single-sex education may be particularly beneficial in enabling women to seek and to achieve positions of leadership and authority. Is it really necessary to endanger religious liberty and diversity in order to secure equal opportunity for women in education and employment? I, for one, certainly hope not. Can it really be necessary to destroy the colleges which have educated a disproportionate number of the leading women in America in order to secure women an equal right to education? That does not really seem to make sense.

Most of the controversy surrounding the effects of the currently proposed languages concerns military service and public funding of abortions, however. When Congress decided in 1980 to limit registration for the draft to males, the Senate Armed Services Subcommittee on Manpower and Personnel reported:

> The principle that women should not intentionally and routinely engage in combat is fundamental and enjoys wide support among our people. It is universally supported by military leaders who have testified before the Committee. . . . In addition to the military reasons, which the Committee finds compelling, witnesses representing a variety of groups testified before the Subcommittee that drafting women would place unprecedented strains on family life, whether in peacetime or in time of emergency. . . . A decision which would result in a young mother being drafted and a young father remaining home with the family in a time of national emergency cannot be taken lightly, nor its broader implications ignored. The Committee is strongly of the view that such a result, which would

> occur if women were registered and inducted . . . . is unwise and unacceptable to a large majority of our people. (Quoted from the Congressional Records, June 10, 1980, S6531.)

Since the language of the currently proposed amendment would surely mandate registration and drafting of women, whenever the law requires registration and drafting of men, and would probably also proscribe the combat restriction, it is no wonder this language has encountered serious opposition. It runs directly counter to public opinion.

By way of contrast, current Court doctrine does not require either drafting or putting women in combat positions, because national defense is clearly an important governmental objective to which distinctions on the basis of sex are "substantially related." But it is perhaps also important to note that the Court's decision also would not prevent Congress from drafting women or from putting them in combat positions should that prove desirable. It is not as if there are no women serving in the military right now. The question thus is not whether women may serve in the military. The question is rather whether we must register (and perhaps draft) all women of an eligible age whether or not the armed forces can effectively use them, as a matter of principle, without regard to cost, efficiency or current public sentiments.

Proponents of the currently proposed amendment argue that women will not be regarded as full or equal citizens until they assume the most arduous duty of citizenship--military service. This argument ignores the other side of the traditional sexual division of labor. Is it not as great a public service to bear the future generation as it is to defend the present? Both men and women now have to take time away from their own pursuits in order to ensure the country has a future. Must women do double duty; must they both bear and defend their children in order to be equal? Military service does not, in fact, represent a promising route to equal status for most women, because differences of physical strength affect enlistment, rank and promotion.

Fortunately, military service does not constitute the primary definition of full citizenship in a modern liberal democracy, however; voting does. Military service has, to be sure, been used as a justification for giving certain people voting rights. One of the most powerful arguments in favor of lowering the voting age to eighteen was the assertion that a man old enough to fight for his country was old enough to have a voice in deciding whether tthe nation ought to go to war. Having gained the vote and in 1920 with the 22nd Amendment, women do not need compulsory military service in order to make us full citizens.

The abortion question has probably proved even more deadly to the currently proposed amendment than the draft, however. Is it merely coincidental that serious opposition to the E. R. A. developed in 1973, the year the Supreme Court declared a woman had a right to have an abortion during the first trimester of a pregnancy in Roe v. Wade?

Easy availability of abortion was initially linked to the E. R. A. in the minds and public pronouncements of advocates as a part of woman's freedom to control her own body. Abortion was als linked to the E. R. A. by opponents as part of an attempt, celebrated by radical and well-publicized feminist theorists, to overthrow traditional American values and institutions like the family. Both sides or claims were surely exaggerated. Although a majority of married women now work outside and home and improved birth control techniques have significantly changed general American attitudes about premartial sex, the family has not disintegrated or disappeared.

The "right to life" groups which have emerged in reaction to the Supreme Court's decision in Roe have not as yet mustered enough support to pass their own constitutional amendment prohibiting abortions entirely, but they do seem to have enough popular and legislative backing to block the currently proposed

E. R. A. Critics of the current proposal thus have a powerful point when they argue that the current language would mandate public funding for abortions. Both the United States and states participating in the Medicaid program grant indigent people a right under law to medical care, which would, if not extended to abortions, be denied "on account of sex." (Only women have abortions.) In order to separate the E. R. A. from the the "pro-choice", "pro-life" controversy, as many advocates think it should be, it will be necessary therefore to change the proposed language.

Here again, the approach used by both Congress and the Court has been more moderate than either the absolutist amendment or its opposition. Although the "Hyde amendment" prohibits the federal government from funding certain kinds of abortions, it does not prevent women from having them. The right to decide to terminate a pregnancy during the first trimester granted in Roe v. Wade is, as Justice Stewart pointed out in Harris v. McRae, a right to be free from governmental interference. It is not a right to public support. On the contrary, the right granted women in Roe was explicitly balanced by recognition of the legitimacy of a state concern for the preservation of life. Under current law, therefore, a state can legitimately express such a concern by refusing to provide public funds for abortions.

If the approach taken by Congress and the Court is superior to currently proposed amendment, you might ask, why amend the Constitution at all? Why not just leave things as they are? There are, I believe, two reasons. First, the E. R. A. has always had primarily a symbolic meaning. Although a constitutional amendment is not simply or merely a symbol--the specific language is very important, as I have argued--the Constitution is also more than a legal code, as Chief Justice John Marshall proclaimed so eloquently in McCulloch v. Maryland. The Constitution states the fundamental principles of our government and thereby teaches and reaffirms the people's deepest notions of what is just. An amendment affirming the presumption against sex-based discrimination embodied in current law would not effect the social revolution some of the more extreme advocates of "women's liberation" hoped for; it would certainly not do away with marriage or the family. But it would represent an important step, indeed, a decisive step in achieving public recognition of the equal rights and status of women in the United States of America. And, for this, there seems to be overwhelming public support.

Without a more moderate substitute, on the other hand, defeat of the current proposal is apt to be interpreted as a "set-back," perhaps even as an indication of loss of popular support for equality of rights for women producing a real "set-back" as well. Congressional legislation can easily be changed in response to changes in public opinion; and the Supreme Court has been known to change its mind. A constitutional amendment would provide a much firmer, more lasting basis for the guarantee of equal opportunity to women than either Congressional legislation or Court decisions.

Nor would appropriate language be difficult to find. It is not necessary to "mess up" the amendment or the Constitution with a list of exceptions. This subcommittee could propose language based on current Court doctrine. For example: "Neither the United States nor any state may distinguish persons on the basis of gender unless such distinction be shown to be substantially related to an important governmental objective."

The Court desperately needs a statement of legislative intent and popular will to support and clarify its current holdings, movover. When the Supreme Court decided in 1971 to subject sex-based distinctions in the law to stricter scrutiny than they had in the past, the justices acted against 100 years of precedent and the probable intention of the framers of the 14th Amendment. Although *Reed v. Reed* was a unanimous decision, the members of the current court have not been able to agree on the appplicable standard or the reasons for their subsequent holdings. Many cases have been decided on a 5-4 vote with disagreement among the members of the majority about the reasons or grounds for the decision.

For example, in the very case (Craig v. Boren), in which the Court first articulated its current standard, Justice Powell added the essential fifth vote by stating in the first sentence of his own, separately written statement, that he concurred with the opinion and not merely the judgment or holding of the majority. Yet, Powell went on in that same opinion to add paragraphs of his "reservations" about the application of the equal protection clause to cases of sex-based discrimination the Court had just announced.

In light of the inability of a stable majority of the current Supreme Court to determine what exactly constitutes "invidious discrimination" or when exactly members of the two sexes are or are not "similarly situated," the fact that six of the present justices are more than seventy years of age and hence soon likely to retire also becomes very significant. With no agreed upon doctrine or rationale to guide them, new appointees are apt to come to their own, new, different, and in any case, unpredictable reading of the Fourteenth Amendment with regard to sex-based discrimination. Partly because Congress quite properly waited for state legislatures to ratify the E. R. A., there has already been altogether too much "judge made" law in this area.

A statement of legislative and popular intent in the form of a constitutional amendment embodying the current Court's standard would do a great deal to strengthen and to clarify the law with regard to the status and rights of women in America. Unless the proposed wording is changed, however, we are not apt to see such an amendment proposed or ratified.

CARLETON COLLEGE
NORTHFIELD, MINNESOTA
55057

DEPARTMENT OF POLITICAL SCIENCE

August 8, 1984

Senator Orrin G. Hatch
125 Russell Senate Office Building
Washington, D. C. 20510

Re: Testimony before the Subcommittee on the Constitution,
August 7, 1984
Question: What would you think of an amendment reading:
"Equal protection of the laws shall not be denied
or abridged by the United States or any state on
account of gender."

Dear Senator Hatch:

Upon reflection, I think that the language you propose would be an important and desirable amendment to the United States Constitution. It would provide an explicit textual basis, now lacking (see Chief Justice Burger dissenting in Craig v. Boren 429 U. S. at 217), for the current presumption against discrimination on the basis of gender in Congressional law and Supreme Court decisions. Unlike the wording of the currently proposed equal rights amendment, the language you suggest would allow some distinctions on the basis of gender: it would outlaw unequal protection of the laws, not distinctions on the basis of gender per se. By using the terminology of the Fourteenth Amendment, the language you propose would build on or strengthen existing law rather than challenge it with new constitutional terminology. Because the Court has already applied the equal protection clause to federal and state statutes involving distinctions on the basis of gender, the language you propose would not involve the uncertainty or the potentially undesirable consequences of the absolutist E. R. A. The equal protection language would clearly be read in the context of the other provisions and protections of the Constitution (e. g. the First Amendment's protection of freedom of religion), because these provisions are part of the supreme law to be equally applied. I could, therefore, enthusiastically support such a proposal.

If you were to propose such language, however, I think that you might find yourself pressed on some of the same questions raised about the meaning and impact of the currently proposed E. R. A., because the Supreme Court now finds itself in such disarray with regard to the meaning of "equal protection" concerning not only distinctions on the basis of sex but also "suspect" classifications by race. (See Fullilove v. Klutznick 448 U.S. 448 in which seven members of the court agree that racial classifications are sometimes legitimate, yet no five can agree when or why.) Under equal protection, some distinctions on the basis of gender would be allowed (in contrast to the currently proposed absolutist language). Adding the language you suggest would not necessarily make gender a "suspect classification," but might it not plausibly be read that way? I suggested language incorporating the Craig standard precisely because I think distinctions on the basis of race and distinctions on the basis of sex are different and ought to be treated differently, as they now are under current Court doctrine. I am not particularly wedded to that doctrine. Indeed, because the Court is in such disarray, I do not expect the two or even three tiered reading of the equal protection clause to last, although it does now have status as precedent. I simply think the general outcome and approach is sensible. Precisely because the Court's interpretation of the equal protection clause is so unsettled, you might argue, it would be better to return to the language of the Constitution itself. That seems reasonable enough, but will you have made your intention clear?

I hope that these comments will prove helpful to your and your staff's further reflections. I am very grateful for the courteous reception of my testimony.

Respectfully,

Catherine H. Zuckert

CC: Steven Markman, Chief Counsel
Subcommittee on the Constitution

Senator HATCH. Thank you so much. We appreciate having your testimony. Professor Gerard, we will turn to you at this time.

STATEMENT OF PROF. JULES B. GERARD

Mr. GERARD. Thank you, Senator Hatch. I am honored to have been invited to testify before the subcommittee and appreciate the opportunity to try to make a contribution to the subcommittee's important work.

The language of the equal rights amendment is absolute. It reads, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

There is no question that proponents of the equal rights amendment intend its language to be just as absolute as it appear to be. But when conscientious citizens express some doubt about the desirability of including in the Constitution an absolute prohibition against classifications based on gender, the proponents always claim that two unstated qualifications will be implied to modify ERA's uncompromising language. According to ERA's proponents, these two implied qualifications are, first, the right of privacy, and second, physical characteristics that are unique to one gender.

My task is to discuss these two implied qualifications that proponents allege will temper ERA's absolutist command.

Before turning to the details of these supposed qualifications, however, I would like to emphasize the precise nature of the argument that is being made here. The precise nature of the proponents' argument is that ERA's inflexible language will be modified by unwritten qualifications. The precise nature of the argument, in other words, is that ERA should be ratified because it does not mean what it says. This may be the first time in our history that so ludicrous a reason for taking so important an action has been offered with a straight face.

Who among us would sign a contract to buy a vacuum cleaner under that advice, under advice by the sales clerk that the contract that you are being asked to sign does not really mean what its words say?

Yet we are being asked to amend the Constitution of the United States on the basis of an assurance that no sensible person would rely upon in conducting the routine affairs of everyday life. That is the most important point of this discussion, and I hope it does not get lost when we turn to the details concerning these alleged qualifications.

The first of these is the right of privacy. Many responsible citizens are concerned about ERA's potential effects upon matters that may be grouped together under the generic heading of personal modesty, matters; for example, such as gender-segregated prisons and college dormitories. Proponents of ERA claim their right of privacy will take precedence over ERA's uncompromising language and prevent these effects from coming to pass.

But their claim that the right of privacy will prevent ERA from having a multitude of undesirable effects upon personal modesty is unpersuasive for at least four reasons. The first of these reasons is that the right of privacy, as it has been used by the Supreme Court, has nothing at all to do with personal modesty. As a matter of fact, it does not have anything to do with privacy under any normal meaning of that word. The matters of personal modesty that we are talking about clearly are related to privacy. ERA's proponents would have you believe that that common meaning of the word privacy is the one the Supreme Court gave the word when it invented the right of privacy in the abortion cases. But that is not the meaning of the word privacy that the court gave it.

In the abortion cases the court held that the right of privacy made laws restricting access to abortion unconstitutional. Now, exactly how regulating people's access to surgical procedures that they wish to have performed by others in public hospitals invades their privacy is a mystery the Court has never explained. I think the probable reason is that the only possible explanation is the one that was given by the caterpillar in "Alice in Wonderland," namely, "words mean what I say they mean."

The focus of this right of privacy has always been on preventing Government interference with decisions that the court views should be made in private. One illustration of this is that the court has extended this right of privacy to abortion to children and has made it immune from veto by the parents of those children.

Now, if the court applies that logic to matters of personal modesty, the result is perfectly predictable. Suppose one believes, for example, as I do, that athletic locker rooms in high schools and colleges should be segregated by gender whether or not the students want them to be.

The clear import of both the language of ERA and the right of privacy, as the Supreme Court defines it, is that such a restriction would be unconstitutional.

The second reason that the argument that the right of privacy will modify ERA's terms is unpersuasive is that even if a right of privacy that includes personal modesty does exist, traditional rules of constitutional interpretation would require it to be nullified by any inconsistent provision of ERA.

The essential purpose of a constitutional amendment is to change existing law, not to confirm it. Any amendment added to the Constitution nullifies all previous constitutional doctrines that are inconsistent with the terms of the amendment. So even if a right of privacy that includes personal modesty exists, these traditional rules would require it to be overridden.

That existing rights of personal modesty are inconsistent with ERA's language is demonstrated by the fact that ERA's proponents must resort to the right of privacy in order to protect them. If personal modesty were consistent with ERA's express terms, in other words, proponents would not have to rely upon some other constitutional right to guarantee their preservation. They could simply argue that ERA's language could not possibly be interpreted to invade concerns about modesty.

But that argument would be absurd on its face, given the terms of the equal rights amendments. So there can be no question that ERA, as written, will nullify any existing rights of personal modesty.

The third reason that this argument is unpersuasive is that ERA contains no express exceptions for privacy. It would have to be added by judicial interpretation. But there is no way to compel the

Supreme Court, or any court, indeed, to interpret constitutional language in a way that contradicts its plain meaning.

ERA's terms permit no exception to its command for equality of rights under the law. Does that mean, for example, that female nurses may not be preferred in hospital labor rooms, that males may not be banned as guards in all-female prisons or vice versa?

Well, the standard answer of ERA's proponents to questions like these is to invoke the countervailing principle of the right of privacy.

But, as Prof. Paul Freund pointed out years ago, invoking the right of privacy merely restates the problem without answering it. As restated, the problem becomes, which countervailing principles should be held to modify ERA, and, supposing you can identify which principles should be held to do it, when should they prevail over ERA's language and when should they not?

Now, the right of privacy is nowhere mentioned in the Constitution. And I am aware of no legitimate theory of interpretation that permits a right not mentioned in the Constitution to override by implication one that is expressly granted to individuals, as ERA would grant specific rights to individuals.

Even if such a theory existed, as the proponents imply it does, I do not know how courts could be compelled to implement it, as the proponents imply they would be. Freedom of association has a longer judicial history than privacy and is even more plausibly derived from the Constitution's express language. So if privacy must modify ERA, why not freedom of association? Yet if freedom of association were to modify ERA, one would expect the proponents to agree that both major political parties could exclude women or men, if they choose to do so. The proponents would not agree, of course, but their disagreement merely uncovers the thing that they want to keep hidden: namely, that there is no overarching, neutral standard that tells us which countervailing principles are and which are not to be held to modify by implication ERA's unqualified language.

But supposing we move beyond that difficulty; supposing the right of privacy is a countervailing principle that qualified ERA's terms, the question then arises, when does that right prevail and when does it not? In rest rooms or labor rooms, but not in prisons or college dormitories? In prisons but not dormitories? Vice versa? All of the above? None of the above?

These and similar questions obviously can be rearranged in accordance with one's own view of where to draw the line between the tolerable and the insufferable. Equally obviously, none of these questions can be answered with confidence.

Proponents repeatedly claim that the problems created by ERA's language will be resolved by its legislative history, that the courts will employ that legislative history to make commonsense adjustments to its inflexible command. But this claim depends on two assumptions that are dubious at best.

The first assumption is that the Supreme Court will make use of the legislative history. But the Court's performance in recent years shows that it is just as likely to disregard legislative history as it is to give it controlling effect. Perhaps the most telling illustration of the Court's adamant refusal to consider legislative history that contradicted the result the Court wished to reach was legislative reapportionment. I do not plan to go into the details of that case, but Justice Harlan's dissenting opinion in *Reynolds* v. *Sims* made it crystal clear that the legislative history of the 14th amendment and its ratification process both demonstrated conclusively that the equal protection clause was not supposed to have anything to do with legislative apportionment.

These cases and others demonstrate that the Court will resort to legislative history as a guide to constitutional interpretation only if it chooses to do so, even when the relevance of that history is indisputable. And there is no way to compel the Supreme Court or any court to consider legislative history.

The second dubious assumption is that ERA's legislative history gives us clear guidance about its potential impact upon personal modesty. But that also is false. The legislative history discloses that the proponents of the amendment disagreed among themselves about what its effect would be upon privacy.

One piece of that legislative history, I think, is particularly significant. Senator Sam Ervin, who until his retirement was commonly conceded to be the dean of constitutional lawyers in the Senate, offered an amendment to the equal rights amendment which would have said: "This article shall not impair the validity, however, of any laws of the United States or any State which secure privacy to men or women, boys or girls." His proposal was defeated overwhelmingly. The vote in the Senate was 79 to 11 against it.

The fourth reason that this argument is unpersuasive is this: In the past claims that the right of privacy justifies otherwise unconstitutional racial discrimination have invariably been rejected by the court. And there is every reason to suppose that they will also be rejected as justifications for distinctions drawn on account of sex in violation of the equal rights amendment.

In a case decided without dissent by the Supreme Court less than 1 month ago, *Roberts* v. *United States Jaycees*, the Supreme Court held that a State could compel the Jaycees to accept women as members.

The Court conceded that requiring the Jaycees to accept women members intruded upon their first amendment freedom of association as the Court itself had defined freedom of association. But, said the Court, the State's "compelling interest in eradicating discrimination against its female citizens" justified the intrusion.

To be sure, Jaycees involved the freedom of association rather than the right of privacy. But, as I pointed out earlier, the proponents of ERA do not and cannot explain why privacy should be the only constitutional value that will modify ERA's absolute command for equality of rights under the law. The freedom of association that was at issue in Jaycees has better credentials than privacy to be a constitutional value entitled to protection, as I pointed out just a moment ago.

A favorite theme of its proponents is that ERA will require distinctions based on gender to be treated in the same way distinctions based on race are treated under the equal protection clause. But the right of privacy and the freedom of association never have been accepted as justifications for otherwise unconstitutional racial discrimination. The proponents have offered no persuasive reason to believe that they are any more likely to be accepted as justifications for gender distinctions that would be made unlawful by ERA.

And *Roberts* v. *Jaycees* indicates to the contrary, that they will not be accepted.

In the *Bob Jones* decision just a year ago the Supreme Court held that a private religious organization could be denied a tax exemption because of its policy of prohibiting interracial dating and marriage among the students at its school. The racial policy was based upon the organization's interpretation of the Bible. It thus was protected by the free exercise clause, a right which, unlike privacy, is expressly guaranteed by the Constitution.

If the express guarantee of the free exercise of religion, one of our most cherished rights, can be nullified by the prohibition against racial discrimination, it is hard to accept the proponents' claim that the ambiguous right of privacy, which is only implicit, will be immune to ERA's unqualified and specific prohibition against classifications based on gender.

I would like to turn just for a moment to the other qualification, the unique physical characteristics principle. Unlike the right of privacy, which derives from Supreme Court decisions, this principle has its source in a law review article. The one attribute it has in common with the right of privacy is enormous uncertainty about the effect it will have on interpreting ERA.

As the authors of that Law Review article themselves admit, "How the courts would balance each of these factors is difficult to predict in advance of adjudication."

What motivated the authors to create the unique physical characteristics principle is not entirely clear. Much of their discussion suggests that they were anticipating objections to ERA and were looking for a device that would allow them to argue that some laws favoring women, such as rape statutes, would be unaffected by ERA. But they realized that blatant discrimination against women can clearly be articulated in terms of unique physical characteristics, so they had to hedge the principle with subsidiary safeguards to prevent it from being used to circumvent ERA's basic prohibition against classifications based on gender.

The hedge they chose was the requirement that classifications based on unique physical characteristics had to be subjected to strict scrutiny by balancing a complex of six highly technical and intricate factors. As might have been anticipated of a principle, a so-called principle, that is simultaneously supposed to achieve the two diametrically opposite goals of both allowing and forbidding classifications based on gender, the end result is confusion. Let me give you just one example. Consider pregnancy.

If I understand their argument, pregnancy is a legitimate unique physical characteristic for purposes of granting benefits exclusively to women, such as medical payments to cover the cost of an abortion.

But, on the other hand, a classification based on pregnancy is not a proper unique physical characteristic for purposes of denying benefits exclusively to women, such as excluding the cost of childbirth from coverage in a State-funded medical insurance scheme.

When that precise issue was before the Supreme Court, feminists were outraged when the Supreme Court upheld the power of a State to exclude pregnancy from coverage in its medical benefits program. They argued that this was not a legitimate classification based on unique physical characteristics. They argued it was not even a legitimate medical classification, distinguishing pregnancy from other conditions, as the Supreme Court had said it was. They argued that it was outright discrimination based on gender.

A Federal district court recently adopted exactly their theory, that it was discrimination based on gender. The court held unconstitutional a State statute that granted special rehiring benefits to women who left their jobs to have children.

The odd thing is that the people who were outraged by the Supreme Court's opinion were outraged by that opinion, too.

Well, let me conclude with two thoughts. The first is that I have assumed until now that the proponents sincerely believe and honestly intend that the right of privacy and the unique physical characteristics principle will qualify ERA's unyielding terms.

But note should be taken that at least some of ERA's proponents view their right of privacy claim merely as a necessary strategy for ratification. They themselves concede in article after article that accepting a true right of privacy qualification would prevent ERA from accomplishing some of the objectives they desire most fervently.

Under the circumstances it does not seem unfair to suggest that these proponents know full well that their right of privacy claim is dubious at best; that they hope it will be believed only until ERA is ratified, if it is; and that if ERA is ratified, they will disavow it promptly thereafter.

My second thought is this. In the past foresight and language have proven incapable of anticipating and providing for every contingency that might arise with respect to constitutional amendments. Some marginal uncertainties are clearly inevitable with respect to any proposed amendment. But we are not talking about marginal uncertainties and we are not talking about unanticipated developments that create unexpected problems.

What we are talking about is deliberately refusing to resolve obvious ambiguities that are certain to create problems, problems that go to the very heart of the matter under discussion. Unanticipated marginal uncertainties are inevitable, but deliberately refusing to resolve obvious and major ambiguities is inexcusable. And that is what is occurring with respect to the equal rights amendment. Thank you.

[The complete statement follows:]

ERA, THE RIGHT OF PRIVACY, AND UNIQUE PHYSICAL CHARACTERISTICS

Prepared Statement
on the
Reintroduction of the Equal Rights Amendment
submitted to the
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
August 7, 1984

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The language of the Equal Rights Amendment is absolute:

> "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

There is no question that proponents of ERA intend its language to be just as absolute as it appears to be.[1] But when conscientious citizens express some doubt about the desirability of including in the Constitution an absolute prohibition against classifications based on gender, the proponents always claim that two unstated qualifications will be implied to modify ERA's uncompromising language. According to ERA's proponents, these two implied qualifications are (1) the right of privacy, and (2) physical characteristics that are unique to one gender. My task is to discuss these two implied qualifications that proponents allege will temper ERA's absolutist command.

Before turning to the details of the supposed qualifications, however, the precise nature of the argument needs to be emphasized. Citizens who have misgivings about ERA's inflexible language are told that unwritten qualifications will modify its written terms. The precise nature of the proponents' argument, in other words, is that ERA should be ratified because it does NOT mean what it says! This may be the first time in our history that so ludicrous a reason for taking so important an action has been offered with a straight face. Who among us would sign a contract to buy a vacuum cleaner because the sales clerk assured us that the contract does not really mean what its words say? Yet we are asked to amend the Constitution of the United States on the basis of an assurance that no sensible person would rely upon in conducting the routine affairs of everyday life. That is the most important point of this discussion. We should not lose sight of that central point in considering the multitude of details concerning these alleged qualifications.

I

PRIVACY

Many responsible citizens are concerned about ERA's potential effects upon matters that may be grouped together under the generic heading of personal modesty; matters, for example, such as gender-segregated prisons and college dormitories. Proponents of ERA claim that a "right of privacy" will take precedence over ERA's uncompromising language and will prevent these effects from happening. They stride to this dubious conclusion in their seven-league boots of supercilious ridicule and unsupported assertion. They ridicule as yahoos the conscientious people who are sincerely worried about these matters. And they offer nothing to support their claim except their thunderous assertion of it.

Their claim that a right of privacy will prevent ERA from having a multitude of undesirable effects upon personal modesty is unpersuasive for at least four reasons. (1) The "right of privacy" has been used by the Supreme Court mainly as a vehicle for justifying its decisions in abortion cases. As employed in those cases, it has nothing to do with concerns about personal modesty. Indeed, it has nothing at all to do with "privacy," under any normal meaning of that word. (2) Even if a right of privacy that includes matters of personal modesty does exist, traditional rules of constitutional interpretation would require it to be nullified by any inconsistent provision of ERA. (3) ERA contains no express exception for privacy or any other countervailing right. Any such exception would have to be added by judicial "interpretation." But there is no way to compel any court to "interpret" constitutional language in a way that contradicts its plain meaning. (4) In the past, claims that a right of privacy or freedom of association justified otherwise unconstitutional racial discrimination invariably have been rejected. There is every reason to believe that they likewise will be rejected as justifications for distinctions drawn "on account of sex."

Any one of these reasons standing alone is sufficient to raise serious doubts about the accuracy of the proponents' claim. Cumulatively they compel its rejection. For the burden of proof rests at all times on the proponents of a constitutional amendment. The opponents are not required to prove that ERA will invade areas of personal modesty. Rather, the proponents are required to prove that such concerns are illusory.

(1) The meaning of "privacy" in the right of privacy. The matters of personal modesty under consideration here clearly are related to "privacy" as that word is commonly understood. ERA's proponents would have us believe that that common meaning is the one the Supreme Court gave the word when it invented the right of privacy. But that is not the meaning the Court gave it.

In the abortion cases,[2] the Court held that a right of privacy made laws restricting access to abortion unconstitutional. Exactly how regulating (a) people's access to surgical procedures (b) they wish to have performed by others (c) in public hospitals invades their privacy is a mystery the Court has never explained. Probably because the only possible explanation is the one given by the Caterpillar in Alice in Wonderland: "Words means what I say they mean."

Moreover, this right-of-privacy-to-abortion has been extended to children, immune from veto by their parents.[3] If the Court applies that logic to matters of personal modesty, the result is predictable. Suppose one believes, for example, that athletic locker rooms in high schools and colleges should be segregated by gender whether or not the students want them to be. The clear import of both the language of ERA and the right of privacy as the Supreme Court defines it is that such a restriction would be unconstitutional.[4]

I do not argue that the Supreme Court could not or would not expand the meaning it gives the word "privacy" to include modesty concerns. It could and it might. The argument rather is: (a) as the Court presently defines it, the right of privacy has nothing to do with personal modesty; (b) there is no way to compel the Court to give the word "privacy" its normal meaning; and (c) even were the Court to give the word its normal meaning, there is no reason to suppose, as the locker room hypothetical demonstrates, that the result will be that which a majority of citizens would desire.

(2) Traditional canons of constitutional interpretation. The essential purpose of a constitutional amendment is to change existing law, not to confirm it. Any amendment added to the Constitution nullifies all previous constitutional doctrines that are inconsistent with the amendment. So even if a right of privacy that includes personal modesty does exist, traditional rules of constitutional interpretation would require it to be overridden by any inconsistent provision of ERA.

The Supreme Court invoked this very principle less than ten years ago in Fitzpatrick v. Bitzer.[5] Male state employees brought suit claiming that the state's retirement plan discriminated against them on account of their sex, in violation of Title VII of the Civil Rights Act. The state defended on the ground that the Eleventh Amendment barred suits against states. But the Court held that the later-ratified Fourteenth Amendment, upon which Title VII was based, nullified the inconsistent provisions of the Eleventh Amendment, and rejected the state's defense.

That existing rights of personal modesty are inconsistent with ERA's uncompromising language is demonstrated by the fact that its proponents must resort to the right of privacy to protect them. If personal modesty were consistent with ERA's express terms, in other words, proponents would not have to.

rely upon some other constitutional right to guarantee their preservation. They would be able to argue simply that ERA's language could not possibly be interpreted so as to invade concerns about modesty. Such an argument would be absurd on its face. There can be no question, then, that, under basic principles of constitutional interpretation, ERA *as written* will nullify any existing rights of personal modesty.

I do not argue that the Court will apply these traditional canons to overturn concerns for personal modesty under ERA; it may or may not do so. But the burden, I repeat, is not on the opponents of ERA. The burden is upon the proponents to make a persuasive case that the Court will *not* invoke these traditional rules of constitutional construction.

(3) ERA contains no express exception for privacy or any other countervailing right. ERA's terms permit no exception to its command of "equality of rights under the law." Does that mean that female nurses may not be preferred in hospital labor rooms?[6] That males may not be banned as guards in all-female prisons (or vice versa)?[7]

The standard answer of ERA's proponents to questions like these is to invoke the countervailing principle of a right of privacy. But, as Professor Paul Freund pointed out years ago, invoking the right of privacy merely restates the problem without answering it.[8] As restated, the problem becomes: (a) Which countervailing principles should be held to modify ERA? and (b) When should they prevail over ERA's uncompromising language?

The right of privacy is nowhere mentioned in the Constitution. I am aware of no legitimate theory of interpretation that permits a right not mentioned in the Constitution to override by implication one that is expressly granted to individuals. Even if such a theory existed, as the proponents imply it does, I do not know how courts could be compelled to implement it, as the proponents imply they would be.

Freedom of association has a longer judicial history than privacy, and is even more plausibly derived from the Constitution's express language. Moreover, it springs from First Amendment values that always have received special protection from the courts. So if privacy must modify ERA, why not freedom of association? Yet if freedom of association were to modify ERA, one would expect the proponents to agree that both major political parties could exclude women (or men) if they choose to do so. The proponents would not agree, of course. But their disagreement merely uncovers what they would like to keep hidden; namely, that no overarching neutral standard exists to tell us which countervailing principles are, and which are not, to be held to modify by implication ERA's unqualified language.

Even [illegible] these problems are ignored, still more difficulties remain. Supposing the right of privacy is a countervailing principle that qualifies ERA's terms, when does that right prevail and when does it not? In restrooms and labor rooms but not in prisons or college dormitories? In prisons but not dormitories? Vice versa? All of the above? None of the above? These and similar questions obviously can be rearranged in accordance with one's own view of where to draw the line between the tolerable and the insufferable. Equally obviously, none of these questions can be answered with confidence.

Proponents repeatedly claim that the problems created by ERA's language will be resolved by its legislative history; that the courts will employ its legislative history to make commonsense adjustments to its inflexible command. But this claim depends upon two assumptions that are dubious at best.

First, it assumes that the Supreme Court will make use of the legislative history. But the Court's performance in recent years shows that it is just as likely to disregard legislative history as to give it controlling effect. Perhaps the most telling illustration of the Court's adamant refusal to consider legislative history that contradicted the result the Court wished to reach is legislative reapportionment. The late Justice Harlan, dissenting in Reynolds v. Sims,[9] critized the majority in characteristically straightforward language:

> "The Court's constitutional discussion ... is remarkable for its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amenament pertinent to the matter at hand....[10]
>
> "The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment."[11]

As is well known, Justice Harlan's was a voice crying in the wilderness.

A more recent example is also illuminating. In Marsh v. Chambers,[12] the Court relied exclusively upon the legislative history of the First Amendment to uphold the power of a state to pay a chaplain for its legislature. The decision is enlightening because three Justices dissented in the face of legislative history that was crystal clear.

These cases demonstrate that the Court will resort to legislative history as a guide to constitutional interpretation only if it chooses to do so, even when the relevance of that history is indisputable. And there is no way to compel the Supreme Court (or any court) to consider legislative history.

The second dubious assumption is that ERA's legislative history gives clear guidance about its potential impact upon personal modesty.[13] But the legislative history is ambiguous.

When ERA first was debated in Congress, Senator Sam Ervin, the dean of the Senate's constitutional lawyers until his retirement, proposed that the following language be included in ERA's terms:

> "This article shall not impair the validity, however, of any laws of the United States or any State which secure privacy to men or women, boys or girls."

His proposal was defeated overwhelmingly: the vote was 79 to 11 against it.[14]

This is not the only illustration. Other items of legislative history reflect the plain fact that ERA's proponents disagreed among themselves about the effect it would have upon matters of personal modesty.[15]

Two things should be obvious from this discussion. First, supposing courts would resort to the legislative history, which item of that history they would select as persuasive cannot be predicted with anything that resembles assurance. Second, the claim of ERA's proponents that the legislative history guarantees that ERA will not be interpreted to intrude upon personal modesty is little short of preposterous.

(4) The right of privacy as a constitutional justification for classifying on the basis of gender. In a case decided without dissent less than a month ago, Roberts v. United States Jaycees,[16] the Supreme Court held that a state could compel the Jaycees to accept women as members. The Court conceded that requiring the Jaycees to accept women members intruded upon their First Amendment freedom of association. But, said the Court, the state's "compelling interest in eradicating discrimination against its female citizens" justified the intrusion.[17]

To be sure, Jaycees involved the freedom of association rather than the right of privacy. But, as I pointed out earlier, the proponents of ERA do not and cannot explain why privacy should be the only constitutional value that will modify ERA's absolute command for "equality of rights under the law." The freedom of association that was at issue in Jaycees has better credentials than privacy to be a constitutional value entitled to protection. It is more plausibly derived from the Constitution's express language, and its roots are in the First Amendment, which has always received special protection from the courts.

A favorite theme of its proponents is that ERA will require distinctions based on gender to be treated in the same way that distinctions based on race are treated under the Equal Protection Clause. But the right of privacy and the freedom of association never have been accepted as justifications for otherwise unconstitutional racial discrimination. The proponents have offered no persuasive reason to believe that they are any more likely to be accepted as justifications for gender distinctions that would be made unlawful by ERA. And Jaycees suggests to the contrary that they won't be accepted.

The issue has been raised expressly in a few, and implicitly in many, of the race cases. The landmark decision is Runyon v. McCrary,[18] which held that Congress, acting under the Fourteenth Amendment, could make it illegal for wholly private schools to refuse to admit children because of their race. In the course of rejecting an argument that this holding violated the right of privacy of the school's students and their parents, the Court said:

> "The Court has held that in some situations the Constitution confers a right of privacy. See Roe v. Wade .... But it does not follow that because government is largely or even entirely precluded from regulating the childbearing decision, it is similarly restricted by the Constitution from regulating the implementation of parental decisions concerning a child's education.
>
> "The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation."[19]

And in rejecting a similar argument with respect to freedom of association in the same case, the Court said:

> "From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle."[20]

The Court in Runyon quoted the following language from its earlier decision in Norwood v. Harrison:

> "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."[21]

It is not the least bit farfetched to suggest that, under a ratified ERA, the Court could say, paraphrasing Runyon and Norwood, "From this principle it may be assumed that people have a right to *believe* that prisons and college dormitories should be sexually segregated, but it does not follow that the *practice* of segregating them is protected by the same principle. People have no constitutional right to be unfettered by reasonable government regulation. Invidious sexual discrimination may be characterized as a form of exercising the right of privacy, but it cannot be accorded affirmative constitutional protection in the face of an express constitutional prohibition like ERA."

In the *Bob Jones* decision[22] just a year ago, the Court held that a private religious organization could be denied a tax exemption because of its policy of prohibiting interracial dating and marriage among the students at its school. The racial policy was based upon the organization's interpretation of the Bible. It thus was protected by the Free Exercise Clause, a right which, unlike privacy, is expressly guaranteed.

If the express guarantee of the free exercise of religion, one of our most cherished rights, can be nullified by the prohibition against racial discrimination, it is hard to accept the proponents' claim that the ambiguous right of privacy, which is only implicit, will be immune to ERA's unqualified and specific prohibition against classifications based on gender.

II

UNIQUE PHYSICAL CHARACTERISTICS

The second principle that proponents allege will modify ERA's absolute prohibition against classifications based on gender is stated in terms of "physical characteristics that are unique to one sex." Unlike the right of privacy, which derives from Supreme Court constitutional decisions, this principle has its source in a law review article.[23] The one attribute it has in common with the right of privacy is enormous uncertainty about the effect it will have on interpreting ERA. As the authors of that law review article themselves admit, "How the courts would balance each of these factors is difficult to predict in advance of adjudication."[24]

What motivated the authors to create the unique physical characteristics principle is not entirely clear. Much of their discussion suggests that they were anticipating objections to ERA, and were looking for a device that would allow them to argue that some laws favoring women, such as rape statutes, would be unaffected by ERA. But they realized that blatant discrimination against women can be articulated in terms of unique physical characteristics, as, for example, by requiring all police officers and firefighters to have testicles. So they had to hedge the principle with subsidiary safeguards to prevent it from being used to circumvent ERA's basic prohibition against classifications based on gender. The hedge they chose was a requirement that classifications based on unique physical characteristics had to be subjected to "strict scrutiny" by balancing a complex of six highly technical and intricate "factors."[25] As might have been anticipated of a "principle" that is simultaneously supposed to achieve the two diametrically opposing goals of allowing and forbidding classifications based on gender, the end result is confusion.

Consider the example of pregnancy. If I understand the argument, pregnancy is a legitimate unique physical characteristic for purposes of granting benefits exclusively to women, such as medical payments to cover the cost of an abortion. But pregnancy is not a proper unique physical characteristic for purposes of denying benefits exclusively to women, such as excluding the cost of childbirth from coverage in a state-funded medical insurance scheme.[26] Feminists were outraged when the Supreme Court upheld the power of a state to exclude pregnancy from coverage in its medical benefits program. This was not a legitimate classification based upon unique physical characteristics, they argued; it wasn't even a legitimate medical classification (pregnancy versus other conditions), as the Supreme Court said it was. It was outright discrimination on the basis of gender.[27] However, when a federal court recently adopted exactly their theory, overturning a state statute that granted special rehiring benefits to women who left their jobs to have children because it was contrary to

Title VII's prohibition (like that of ERA's) against discrimination based on gender, they were outraged by that too.[28]

Consider the additional example of rape. Forcible rape laws, the creators of the unique physical characteristics principle assure us, will not be nullified by ERA. The tortuous logic by which they reach this conclusion is remarkable.

They begin by saying, "the court might find that rape is an extremely traumatic event for the victim."[29] That is doubtless true, but is it because of some physical characteristic that is unique to women? Earlier the authors took enormous pains to emphasize that "this subsidiary principle [of unique physical characteristics] is limited to physical characteristics and does not extend to psychological, social or other characteristics of the sexes."[30] (Emphasis in the original.) Do the authors seriously mean to suggest that a male who is brutally sodomized by another male (as in the fictional scene from the novel Deliverance) does not suffer "an extremely traumatic event"?

The authors go on to say that "forcible penetration carries high danger of injury to the victim."[31] Again this is doubtless true. But is the danger any less for the sodomized male?

"A criminal penalty is an appropriate way of deterring rape,"[32] the authors say. But violating their own instructions, they don't even mention, let alone analyze, the fifth and sixth factors of their strict scrutiny analysis, the former of which is the less drastic alternative of sex-neutral laws.[33] It surely is obvious that forcible sex crimes can be redefined in gender-neutral terms.

Finally the authors argue that "rape laws are intended to give special protection from assault to women's vaginas .... Rape laws could thus be sustained as a legislative choice to give one part of the body (unique to women) special protection ...."[34] But just a few pages earlier, the authors were unstinting in their condemnation of compulsory maternity leave laws, the purpose of which is to protect the fetus.[35] Those laws might also be described without distortion as "a legislative choice to give one part of the body (unique to women) special protection."

I do not argue that this unique physical characteristics principle is utter nonsense. It isn't. But before we add the uncompromising language of ERA to the Constitution, we ought to have some reasonably clear idea of the extent to which it will permit laws to take account of physical characteristics that are unique to one gender. This so-called "principle" fails to provide that needed clarity.

CONCLUSION

I have assumed until now that the proponents sincerely believe and honestly intend that the right of privacy and the unique physical characteristics principle will qualify ERA's unyielding terms. But note should be taken that at least some of ERA's proponents view their right of privacy claim merely as a necessary "strategy for ratification."[36] They themselves concede that accepting a true right of privacy qualification would prevent ERA from accomplishing some of the objectives they desire most fervently. Under the circumstances, it does not seem unfair to suggest that these proponents know full well that their right of privacy claim is dubious at best, that they hope it will be believed only until ERA is adopted, and that they will disavow it promptly thereafter.

This statement had a very limited purpose: to show, contrary to the claims of proponents, that it is far from certain that courts in the future will use the right of privacy or the unique physical characteristics principle to shield personal modesty from the threats posed by ERA's ~~uncompromising~~ absolute prohibition. ~~language.~~ The burden is not on me or any other opponent to prove that ERA will intrude intolerably upon personal modesty. Instead, the burden is on the proponents to demonstrate that the potential effects many conscientious citizens worry about never will come to pass. They have utterly failed to carry that burden.

Amending the Constitution is a take-it-or-leave-it proposition. An amendment is either ratified in spite of its flaws or rejected because of them. There is no middle ground. Some marginal uncertainties are inevitable with respect to any proposed amendment. In the past, foresight and language have proven to be incapable of anticipating and providing for every contingency. But there is a vast difference between acknowledging that some unanticipated development of the future may create problems, on the one hand, and deliberately refusing to resolve obvious ambiguities that are certain to create problems that go to the very heart of the matter, on the other hand. The former is inevitable, but the latter is inexcusable. The potential conflict between ERA and personal modesty is the latter kind of problem.

FOOTNOTES

1. Brown, Emerson, Falk & Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 872 (1971) (hereafter cited as Yale L.J.).
2. The landmark case is Roe v. Wade, 410 U.S. 113 (1973).
3. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).
4. Indeed, that is the result some proponents of ERA seem to anticipate, if not desire. See Yale L.J., supra note 1, at 901-02:

> "The separation of facilities for reasons of privacy would not mean that individuals or groups would be foreclosed from making flexible and various arrangements for the common use of facilities such as bathrooms. In the same way, hospitals could allow patients to choose a ward with individuals of the same sex or of both

> sexes. Such noncoerced decisions, springing from individual values and preferences in areas of private conduct, would not be affected by the Amendment. . . .
>
> "It should be added that the scope of the right of privacy in this area of equal rights is dependent upon the current mores of the community. Existing attitudes toward relations between the sexes could change over time--are indeed now changing--and in that event the impact of the right of privacy would change too."

5. 427 U.S. 445 (1976).
6. See Backus v. Baptist Medical Center, 510 F. Supp. 1191 (E.D. Ark. 1981).
7. See Dothard v. Rawlinson, 433 U.S. 321 (1977). For contrary results holding that women must be permitted to serve as guards in all-male institutions, see Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir. 1980), and the decision of a Michigan federal court reported in the New York Times, Feb. 8, 1984, at 23.
8. See Freund, The Equal Rights Amendment is Not the Way, 6 Harv. C.R.-C.L. L. Rev. 234, 240-41 (1971).
9. 377 U.S. 533 (1964).
10. Id. at 590 (dissenting opinion).
11. Id. at 595 (dissenting opinion).
12. 463 U.S. ___, 103 S. Ct. 3330 (1983).
13. A third assumption, only slightly less dubious than the two mentioned in the text, is that the Supreme Court will follow the guidance provided by the legislative history if ~~[illegible]~~ the guidance is clear. But for an illustration of the Supreme Court "interpreting" the legislative history of a statute to mean exactly the opposite of what it said, see United Steelworkers v. Weber, 443 U.S. 193 (1979).
14. See 118 Cong. Rec. 9,529-31 (1972).
15. For some examples, see (Senator) O. Hatch, The Equal Rights Amendment: Myths and Realities 57-60 (1983); (Solicitor General) R. Lee, A Lawyer Looks at the Equal Rights Amendment 65-68 (1980).
16. 52 U.S.L.W. 5076 (1984).
17. Id. at 5080.
18. 427 U.S. 160 (1976).

19. *Id*. at 177-78.
20. *Id*. at 176 (emphasis in original).
21. 413 U.S. 455, 470 (1973).
22. 461 U.S. ___, 103 S. Ct. 2017 (1983).
23. Yale L.J., *supra* note 1, at 893-96.
24. *Id*. at 896.
25. *Id*. at 894-96. The six factors, in summary form, are: (1) "The proportion of women [Why only women?] who actually have the characteristic in question." (2) "The relationship between the characteristic and the problem." (3) "The proportion of the problem attributable to the unique physical characteristic of women." (4) "The proportion of the problem eliminated by the solution." (5) "The availability of less drastic alternatives," including the possibility of drafting the statute in "sex neutral" language. And (6) "The importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution."
26. Geduldig v. Aiello, 417 U.S. 484 (1974).
27. See Bartlett, Pregnancy and the Constitution: The Uniqueness Trap, 62 Calif. L. Rev. 1532 (1974).
28. California Federal S. & L. Ass'n v. Guerra, 34 Fed. Employment Prac. Cases 562 (C.D. Cal., March 21, 1984). See Gorney, The Law's the Same for a Man: Have a Baby, Lose Your Job, Washington Post National Weekly Edition, April 23, 1984, at 6.
29. Yale L.J., *supra* note 1, at 956.
30. *Id*. at 893.
31. *Id*. at 956.
32. *Id*.
33. *Id*. at 894-96. See note 25, *supra*.
34. *Id*. at 956.
35. *Id*. at 929-32.
36. Scales, Toward a Feminist Jurisprudence, 56 Ind. L. Rev. 375, 416 n.227 (1981).

Senator **Hatch**. Thank you. I appreciated both of your excellent statements here today. You covered these areas very well.

Let me begin by asking each of you a number of questions about the nature of the alleged exceptions to the rule of equality contained in ERA itself. As you know, proponents of the equal rights amendment often argue that the amendment contains two implicit exceptions. As you mention, Professor Gerard, these exceptions seem clearly to be derived from the Yale Law Journal article on the ERA in 1971 by Emerson and Freedman.

One of these exceptions relates to a so-called constitutional right to privacy. The other relates to a unique physical characteristics concept.

Can each of you share with me your perspective on the genesis of these exceptions? Do they flow naturally from the text of the equal rights amendment itself or have they merely evolved in response to short-term political problems faced by the ERA proponents? Shall we start with you, Mrs. Zuckert?

Mrs. **Zuckert**. I think it is not quite fair to say that the exceptions have arisen, at least in the Yale Law Journal article, simply in response to short-term political considerations, because that article was written to explain the amendment the first time around. It was written prospectively rather than in light of some of the questions that have been asked since.

I am afraid my answer has to be a little bit speculative in nature. I think the unique physical characteristics exception arises for two different kinds of reasons. One is, as I read the Yale Law Journal article, the outcome of ERA as they described it would be simply to say that in the law you can't use the terms "female" or "male."

And then the question becomes, well, can the law talk about what are differences that everyone observes? And I think their answer to that question is, well, yes, you can talk about them without using the general terms, if you can be very specific.

And as I recall, the example they offer is that you could regulate sperm banks. That would obviously apply only to men. That's a very narrow characteristic. As Professor Gerard pointed out, there has been much more controversy about that since with regard to the coverage of title VII and whether pregnancy is such a unique physical characteristic or not.

And I guess the outcome of that controversy is, no, pregnancy is not, and if pregnancy is not a unique physical characteristic, it is difficult to say what is. That was the first part of your question, and now, I am sorry, I have forgotten the second.

Senator **Hatch**. I think you have already answered it. Professor Gerard.

Mr. **Gerard**. Well, the answer to the first part of the question is, no, they did not arise from the text of the equal rights amendment. The equal rights amendment language is absolute, unqualified. There are no exceptions. Every exception that Senator Ervin and Congressman Wiggins in the House proposed was rejected by overwhelming votes.

They do not arise naturally. Or one can say that if they arise naturally then a lot of other potential exceptions arise also. There is no reason that I can think of why privacy should be held to be an exception and freedom of association should not be; why free exercise of religion should not be an exception. It is perfectly obvious that you can, if you wish, construe the language of the equal rights amendment to be utterly consistent with all other provisions of the Constitution by cutting back on its total impact.

But the problem with that is by the time you get all of those adjustments made, then you ask well, what exactly will the equal rights amendment accomplish? And the answer ends up being nothing.

With respect to unique physical characteristics, I confess that I do not have the faintest idea what it is supposed to cover. The two examples that keep getting repeated are the ones that you gave in your question, wet nurses and sperm banks.

Those are such de minimis problems it is hard for me to believe that anybody would seriously consider them. I think that what they were after, as I said in my prepared testimony, is that they were anticipating objections to the equal rights amendment and were attempting to figure out some rationale by which they could make arguments that would refute, they hoped, arguments that were objections to it.

At the same time, they did not want to change the language of the equal rights amendment. Let me quote two short paragraphs from that Yale Law Journal article dealing with the right of privacy:

> Separation of facilities for reason of privacy would not mean that individuals or groups would be foreclosed from making flexible and various arrangements for the common use of facilities, such as bathrooms. In the same way, hospitals could allow patients to choose a ward with individuals of the same sex or of both sexes. Such noncoerced decisions springing from individual values and preferences in areas of private conduct would not be affected by the amendment.
>
> It should be added that the scope of the right of privacy in this area of equal rights is dependent upon the current mores of the community. Existing attitudes toward relations between the sexes could change over time, are indeed now changing, and in that event the impact of the right of privacy would change, too.

I think it is perfectly obvious what they are saying. What they are saying is, we are using this argument for all you people who are worried about things like prisons and dormitories and bathrooms. But we do not want to change the language because if we have a number of people who would like unisex bathrooms, unisex dormitories, unisex prisons, we want to leave that option open to them and make it possible.

Senator HATCH. Professor Zuckert, Professor Emerson testified before the House Judiciary Committee last year and was questioned about the idea of exceptions to the ERA. He reiterated the two exceptions contained in the Yale Law Journal article and suggested an additional exception relating to the idea of affirmative action and affirmative action programs. He suggested that affirmative action policies would not be unconstitutional under the equal rights amendment even if they did involve differential treatment of individuals on the basis of sex.

What is your own attitude with regard to the treatment of affirmative action programs under the equal rights amendment?

Mrs. ZUCKERT. I think anyone who reads the language of the proposed amendment as it is stated would have to conclude that affirmative action programs would become unconstitutional if that language were added to the U.S. Constitution. I am aware that the argument is made that affirmative action could be allowed as a judicial or a legislative remedy. Usually people who come to that conclusion—and I think Professor Emerson would be among them—argue that conclusion on the basis of current court interpretation of the equal protection clause, which allows suspect classifications to be used for compelling State interests.

It seems to me that the explicit language would supersede current court interpretation. On the other hand, I have read cases in which the Supreme Court has given rulings that go contrary to the record of legislative intent. So I do not think anyone could say with absolute certainty that affirmative action would be ruled unconstitutional. The best I can do is to say that that is what the language means, it seems to me, on its face. And if you do not want to rule it unconstitutional, you ought to change the language.

Senator **Hatch**. Then you would disagree with ERA theorist Barbara Babcock who argues that to allow affirmative action under the ERA would establish a dangerous precedent and would reinstate the concept of protective legislation for women. Is that correct?

Mrs. **Zuckert**. More or less, yes.

Senator **Hatch**. In other words, you would disagree with her.

Mrs. **Zuckert**. As far as I can see, affirmative action would violate the clear meaning of the words of the proposed amendment. And I suppose that one could argue that it would reinstitute protective legislation in the sense that it would still be making distinctions on the basis of sex.

Senator **Hatch**. Then on that basis, would it be fair to state that you disagree with Professor Emerson?

Mrs. **Zuckert**. Yes.

Senator **Hatch**. And you would not see eye to eye as well with most other ERA proponents on their understanding of the relationship of the equal rights amendment and affirmative action.

Is that correct, Professor Gerard?

Mr. **Gerard**. Yes. I would like to add a little footnote. Some of the same people who now argue that affirmative action would be permissible under the equal rights amendment are the same people who, when the Supreme Court decided cases upholding statutes that granted benefits to women but not to men—for example, *Kahn* v. *Shevin*, where widows were granted special tax deductions that were not available to men; such as *Schlesinger* v. *Ballard*, where women naval officers were granted special benefits that were not available to male naval officers—these same people were highly critical of those decisions.

As a matter of fact, the strongest statement that I heard condemning the Supreme Court's decision in the *Michael M.* case, which sustained a statutory rape law from California applying only to males, came from the National Organization for Women. And I cannot believe that people who sincerely believe that affirmative action decisions ought to be unconstitutional under the 14th amendment can honestly turn around and say that they are going to be permissible under the equal rights amendment. That argument is just preposterous.

Senator HATCH. I see. Let me suggest another possible exception to the equal rights amendment. Professor Emerson has again stated that the ERA would not necessarily place into question such institutions as all-male private schools or all-male clubs which enjoy tax exemptions because of the constitutional protections for the right to freedom of assembly.

Would you agree with Professor Emerson in this specific regard? More generally, are there other exceptions to the ERA which are implicit in the fact that the amendment must be read in the context of the rest of the Constitution? Are there seeds of additional exceptions here?

Mrs. ZUCKERT. It seems to me the most relevant case probably for the tax-exempt status of all-male schools would be the *Bob Jones* case. And I think if the ERA as currently proposed were adopted, that then such schools would be in danger of losing their tax exempt status for the same reasons Bob Jones did.

Senator HATCH. What about all-female schools?

Mrs. ZUCKERT. Also.

Senator HATCH. The same thing?

Mrs. ZUCKERT. The same thing. I do think there is a possible exception in the first amendment in terms of freedom of religion, since it has explicit constitutional recognition. It is not like the right of privacy which is a judicial construct. But it would be much more difficult to say in the case of orthodox seminaries.

Senator HATCH. How does that square with the *Bob Jones* decision in which a college claimed they were exercising their freedom of religion in establishing certain racial policies—an explicit guarantee in the Constitution.

Mrs. ZUCKERT. I suppose because there would not be the same kind of historical precedent as there would be for Jewish seminaries or for the Catholic Church.

Senator HATCH. I see. Professor Gerard?

Mr. GERARD. I agree completely. It seems to me the *Bob Jones* case, in terms of religion, the *Roberts* v. *Jaycees* case, with respect to the freedom of association, and *Mississippi* v. *Hogan*, with respect to single-sex schools, are clearly unconstitutional under the equal rights amendment.

Until recently there was not even any debate about that among proponents of the equal rights amendment. There was a time when they all agreed that those things would be unconstitutional under the equal rights amendment.

Senator HATCH. Let me focus briefly on the two exceptions outlined in the Yale Law Journal. The first is the unique physical characteristics exception. Let us start with you this time, Professor Gerard.

In attempting to understand this exception, I have to admit, I have had a fairly difficult time. In fact, the only specific illustration that I have heard thus far are the two mentioned by you today—that only a man could be a sperm bank donor or only a woman could be a wet nurse.

These exceptions are all fine and good, but we know, at least on the basis of the testimony given by Professor Freedman, that this exception has nothing to do with the abortion procedure. Could either of you suggest public policies which would clearly be affected by the alleged unique physical characteristics exception to the ERA?

Mr. GERARD. The question was public policies that would be affected by ERA?

Senator HATCH. Public policies that would be clearly affected by the alleged unique physical characteristics exception to the ERA.

Mr. GERARD. Many women claim that in order to guarantee equal treatment for women, women have to be given special consideration that takes account of their unique ability to have children, unique considerations, for example——

Senator HATCH. Of course, proponents have testified before this committee that abortion and pregnancy would not be affected by the equal rights amendment.

Mr. GERARD. Well, they deny that before the committee, but then when the Federal court in California overturned that State law, they were all calling the newspapers pointing out what a terrible thing that is. It is part of the public-private posture of these things. They say one thing to congressional committees and say another thing to the public.

Senator HATCH. And then say another thing in court?

Mr. GERARD. I am sorry?

Senator HATCH. And then say another thing in court?

Mr. GERARD. And another thing to the courts; that is exactly right. The same people who tell you that there is no connection between abortion and ERA are the same ones who are in the court arguing that there is a connection; that any refusal to fund abortions is prohibited by State equal rights amendment laws. They are the same people that walk right out of court and testify before a committee saying there is no connection.

Senator HATCH. Do you agree with that, Mrs. Zuckert?

Mrs. ZUCKERT. I would agree. It would seem to me that what unique physical characteristics ought to refer to would be pregnancy-related or differences in reproductive systems. There has been a great deal of controversy before this subcommittee and before the courts that I think has confused the issue.

That seems to me to be a reason to have clearer language, and I hope that comes from Congress.

Senator HATCH. Am I correct in assuming, then, that the scope of this exception—unique physical characteristics—is limited to physical differences and that it has no relationship to psychological, temperamental, cultural, social or other characteristics; if they exist? What do you think about that, Professor Gerard?

Mr. GERARD. Well, I really do not know what to think about it. But let me share some thoughts with you. Let us take the example of rape, which they deal with in that Yale Law Journal article.

Forcible rape, these same people who invented this unique physical characteristic principle assure us will not be nullified by ERA. But let us follow the logic by which they come to that conclusion.

The first step in their logic is the court might find that "rape is an extremely traumatic event for the victim." I think that is doubtless true, but is it because of some physical characteristic that is unique to women?

The authors of that law review article say, and I quote: "This subsidiary principle," referring to unique physical characteristics, "is limited to physical," and they underscore the word physical, "characteristics and does not extend to psychological, social, or other characteristics of the sexes."

Now, do the authors seriously mean to suggest that a male who is brutally sodomized by another male, as in the fictional scene from the novel "Deliverance," does not suffer an extremely traumatic event, to put it in their words?

The authors go on to say that, "forcible penetration carries high danger of injury to the victim." And again I think that is doubtless true. But is the danger any less for the sodomized male than for the raped female?

They say: "A criminal penalty is an appropriate way of deterring rape." But having said that, they violate their own instructions, which were, when dealing with these unique physical characteristics, you have to consider all six of their factors. The last two of those factors that they say must be considered were, one, the availability of less drastic alternatives, including the possibility of drafting the statute in sex-neutral language; and, two, the importance of the problem ostensibly being solved as compared with the cost of the least drastic solution.

In this discussion of rape they do not even mention, let alone discuss, their own fifth and sixth standards that are supposed to apply to these statutes.

Now, it is surely obvious that you can redraft laws dealing with forcible sex crimes in a sex-neutral way.

And finally they argue that "rape laws are intended to give special protection from assault to women's vaginas. Rape laws could thus be sustained as a legislative choice to give one part of the body unique to women special protection." I am quoting from the law review article.

But just a couple of pages before they make that statement they were absolutely unstinting in their condemnation of laws that required pregnant women to take maternity leaves from jobs. Every one of those laws was passed for the same purpose, to protect the fetus that the woman is carrying. You can describe those laws, it seems to me, without any distortion and without any exaggeration, in the same way that they describe the rape statute; namely, as a legislative choice to give one part of the body unique to women special protection.

So, to be perfectly honest with you, I cannot make any sense out of this unique physical characteristics principle except as one that you can use if you want to in order to sustain some statutes but can ignore if you would rather not deal with it.

Senator HATCH. Would you care to comment about that, Professor Zuckert?

Mrs. ZUCKERT. I think probably the unique physical characteristics test or limitation has to be read in the context where it was first proposed, that is, of the Yale Law Journal article. The intention of the authors, as they state in the beginning of the article, is to minimize if not to destroy all differentiation on the basis of sex. This is a possible but maximally limited exception.

Senator HATCH. According to the proponents of this amendment, however, even such issues as leave for child rearing, rape laws, or prostitution laws would not be implicated in the unique physical characteristics exception. They say, for example, that there is no reason why fathers should not be accorded child rearing leave time on the same basis as women; why both men and women cannot commit rape; why both men and women cannot be involved in prostitution. Again, does all this concur with your understanding of the breadth of the unique physical characteristics exception? We will start with you, Professor Zuckert.

Mrs. **Zuckert**. I think it is not very broad.

Mr. **Gerard**. I do not know.

Senator **Hatch**. Let me ask you this question. Am I further correct that in referring to "unique physical characteristics," proponents of the equal rights amendment are referring only to those characteristics which are found in all or some women but not in any men, or in all or some men but not in any women. This exception would not take cognizance, for example, of the fact that women on the average tend to have less upper body strength or the fact that 90 percent of all women are better at some task than 90 percent of all men. Am I correct in this understanding, Professor Gerard?

Mr. **Gerard**. That certainly coincides with my understanding. As I understand it, it is a negative thing. They mean a characteristic that the other gender does not have at all.

I mean, for example, when they are talking about pregnancy, they realize there are some women who simply cannot become pregnant—too young, too old, or for some physical reason—so that it does not cover all women. But on the other hand, no man can become pregnant.

So as I understand it, you have to view it as a disqualification rather than as a qualification. You look at something that either females are totally incapable of or males are incapable of and then you look back and you say, that is a unique physical characteristic of the other gender.

Senator **Hatch**. I see. Do you agree with that, Professor Zuckert? This is a tough question.

Mrs. **Zuckert**. I am thrown back on the observation that the unique physical characteristics language is not in the proposed amendment and I am troubled by interpreting one set of words by another set of words.

Senator **Hatch**. Yes. Interpreting what it means is difficult because different proponents say it means different things. That troubles me, too. That is one of the problems with this amendment. During the 1971 ERA debate in the Senate, for instance, Senator Birch Bayh, one of my predecessors as chairman of this subcommittee, stated that: "The ERA would not overturn State laws and local ordinances which specifically prohibit obscene phone calls made to women because of the unique physical characteristics exemption."

Mr. **Gerard**. They have ears; that is unique, I gather. Was that what he had in mind?

Senator **Hatch**. Your guess is as good as mine. Let me focus just a bit on the other alleged exception to the rule of "equality" in the equal rights amendment: the right to privacy exception. Am I correct that the scope of this right to privacy exception is different from the right to privacy declared by the Supreme Court in the *Roe* v. *Wade* decision and other related decisions?

Mr. **Gerard**. The position they take is very interesting because they argue that the right to privacy will qualify ERA, but that ERA has nothing to do with abortion. But abortion is exactly what the right of privacy covers.

Senator **Hatch**. It arose really in the context of use of contraceptives?

Mr. **Gerard**. Yes; the whole concept of the right of privacy has been developed not exclusively but almost entirely out of the abortion cases. So, on the one hand, they argue that ERA has nothing to do with abortion even though that is the right of privacy as the Supreme Court has defined it.

On the other hand they argue that the right of privacy does qualify ERA. But then when you ask them to point to a Supreme Court decision that says there is a right of privacy that will cover these kinds of matters that we are talking about, they cannot come up with a single case.

Senator **Hatch**. Do you agree, Professor Zuckert?

Mrs. **Zuckert**. It seems to me actually both of the exceptions that you are concerned about flow from a fundamental commitment taken in that article, which is that any distinction between the sexes constitutes a denial of equality; therefore, you cannot have States, for example, distinguishing males and females in dormitories. I am not convinced that any distinction between the sexes is a qualification of equality.

And it seems to me rather indirect and problematic to bring in a constructed right to privacy to try to deal with some of the problems that follow from the absolute prohibition of sex-based distinctions. If you did not have that first commitment, the right to privacy would not be so relevant or would not be needed as an exception.

Senator **Hatch**. Would you agree with the Yale Law Journal article that "It is impossible to spell out in advance the precise boundaries the court will eventually fix in accommodating the ERA and the right to privacy." Are we just throwing this issue up to be resolved by the judicial branch of government, the nonelected judges?

Mrs. **Zuckert**. I agree that it is impossible to predict, yes.

Senator **Hatch**. So it really comes down to nonelected judges determining these matters.

Mrs. **Zuckert**. I think that the law—and it is judge made in both the area of sex-based discrimination and in the area of right to privacy—is very problematic these days, and for that reason very much needs clarification by the Congress. But for Congress to clarify it you would have to say what you meant, not use such broad language that it is unclear.

Senator **Hatch**. Professor Gerard, Prof. Dick Howard, a distinguished constitutional scholar from the University of Virginia School of Law, has called the right to privacy a legal hypothesis and claims that it is neither a reflection of existing law nor necessarily an accurate prophecy of what may eventually become law. What would be your response to Professor Howard's comment?

Mr. **Gerard**. I would agree with him. I would agree with all three points. I think it is a hypothesis. I think that it clearly is not a description of what the law is, and that nobody can predict what the Supreme Court will do.

There is a historical precedent here. At the time the 14th amendment was being debated by the States, the opponents of the 14th amendment had a kind of little tent show that they would put on in various States.

The tent show consisted of a black male being put through a mock marriage ceremony with a white female. The opponents of the 14th amendment said if you ratify the 14th amendment, this is what is going to happen. All our laws that prohibit marriage between races are going to become unconstitutional.

The proponents 100 years ago were saying exactly what the proponents of the equal rights amendment are saying today. That is ridiculous. That is absurd. That will never happen. That cannot conceivably happen. It just could never come to pass.

Well, it came to pass, as we know. The Supreme Court did, and I think correctly, declare miscegenation laws unconstitutional under the 14th amendment. But I think anybody who tells you that he can predict with certainty how a court, especially the Supreme Court of the United States, is going to decide a case like those we have been considering is either a fool or a liar, one of the two.

Senator HATCH. Professor Zuckert, in your judgment, what kind of public policies would fall within the ambit of the so-called right to privacy exception? An example which has been raised concerns separate dormitories for men and women at public universities or perhaps in the military. Can you think of other possibilities?

Mrs. ZUCKERT. I think that those policies probably would not come so much under a right to privacy because I really do not believe that a court-constructed doctrine can hold up very successfully against the explicit words of the Constitution.

I can see that placement in dormitories, for example, or even military service could perhaps be interpreted the way that dual positions have been endorsed by the Supreme Court in Washington, for example. When members of each sex have a right to compete for equal positions, there is not a denial of rights there or of equality. That is a possible interpretation.

I myself would not rest very much on the right to privacy, per se.

Senator HATCH. I see.

Mr. GERARD. I think it is clear that the right of privacy, as the Supreme Court has defined it, has always centered around preventing the Government from interfering with individual choice. And the result, when you apply that to dormitories, to prisons, to military, is to say that any Government decision that prohibits people from making free choices about those matters is going to be unconstitutional.

The result is that with respect to dormitories, with respect to prisons, and with respect to the military, those arrangements will be maintained only to the extent that the people wish them to be sustained.

And that raises a different kind of a problem. A few years ago I was what at our university is called master of dormitories. There were suites in which six students resided. The most important problem I had perennially was in suites where there were six women. Five women would be down complaining about the other woman, who had her boyfriend in the suite all of the time. They never felt that they had any privacy because she wanted the boyfriend to be there. The same thing was true the other way around. There were always one or two males who had their girls in their suites all the time.

So I do not really know how you can leave this up to personal choice. According to that Emerson quote I read a little while ago, they seem to think that if you leave it up to individual choice all problems will be resolved. But I think all of us are aware of situations we have experienced personally in college dormitories, in high school, where you are forced to be together with groups and you simply cannot permit individuals to have choices about matters of that kind because they are interfering with the rights of all the other members of that group.

Senator HATCH. Well, it was my understanding that any right to privacy articulated by the Supreme Court was largely a private right, not a public right.

Mr. GERARD. That is correct.

Senator HATCH. And that like most private rights, it could be waived by the affected individuals.

Mr. GERARD. That is correct.

Senator HATCH. If, for example a prisoner is deemed to have a right not to be bunked with a prisoner of the opposite sex, it was my understanding that such a right could always be waived if it was merely a private as opposed to a public right.

Could you please help me understand this concept more clearly?

Mr. GERARD. You are right. It seems to me that the road we are on is that if a male and a female prisoner want to be bunked together, the Government has no power to require them to be segregated.

Senator HATCH. Professor Zuckert, how can the right to privacy concept be reconciled with the fact that separate but equal will be unconstitutional under the ERA, just as it is already unconstitutional with regard to races under the 14th amendment?

Mrs. ZUCKERT. I do not understand the question.

Senator HATCH. The concept of separate but equal has been declared unconstitutional under the 14th amendment with regard to the races. Will that concept be constitutional under the equal rights amendment with regard to the sexes?

Mrs. ZUCKERT. I have brought a long statement I probably should read. There are proponents of the equal rights amendment who argue, and I think correctly, that the situation of the races is not the same as the situation of the sexes. And I suppose the status of that separate but equal phraseology from Plessy would be relevant in that case.

Senator HATCH. Let me ask you this question. In your judgment, does the right to privacy exception pose any barrier to the idea that the ERA may require the legalization of single-sex marriage?

Mrs. ZUCKERT. I do not know about the right to privacy. It would seem to me that surely cases would come up under the proposed language challenging any prohibition of homosexual marriages because it would seem to be discrimination on account of sex.

There are arguments, and as far as I know, State courts have decided on both sides of this particular issue. Some say that there is no discrimination because both sexes are prohibited from marrying members of the same sex. I do not see that there is—that that is a necessary reading of the proposed amendment. And there is at least a later Yale Law Journal article in 1973 that argues that in fact this language would sanction homosexual marriages.

Senator **Hatch**. I see. I suppose that a white individual incarcerated in a penal facility would have a pretty difficult time arguing his right to privacy protected him from having to be bunked with a black individual.

Given the repeated statements before this committee that the purpose of the ERA is to absolutely equate the scrutiny of sex classifications with the scrutiny of race classifications for constitutional purposes, why would the ERA treat this situation any differently for men and women?

Mr. **Gerard**. I am sorry. What was the question?

Senator **Hatch**. Why would the ERA treat this situation any differently for men and women?

Mr. **Gerard**. I do not think it would. I think separate but equal has no place under the equal rights amendment.

Senator **Hatch**. Do you agree?

Mrs. **Zuckert**. I think that is why you go around this argument about possible exceptions because the surface meaning of the words is that you should make no distinctions on the basis of sex. And prisons are one institution in which people tend to think that, yes, you should. It goes back to the question, whether making such a distinction is in and of itself a deprivation of equality.

Senator **Hatch**. The interpretation of this right to privacy, then, seems to tolerate separate but equal?

Mr. **Gerard**. Well, yes. That is the way they would like to argue it, that the right of privacy intervenes here and permits separate but equal.

Senator **Hatch**. In a recent seventh circuit case, the court concluded that any right to privacy to be found in the Constitution was subordinate to the right of female prison guards to physically frisk prison inmates, even those inmates whose religions prohibited such other-sex contact.

What does this case suggest as far as the significance of the right to privacy exception? Would this case continue to be good law under the equal rights amendment?

Mr. **Gerard** Oh, I think not only would it continue to be good law; I think it would be mandated. I think that a male prisoner who thought his privacy was being invaded by having female guards, or a female prisoner who thought her right of privacy was being invaded by having male guards, would have no justifiable complaint. There are a number of lower court decisions. You cited one.

There is one out of the eighth circuit involving a penitentiary in Iowa that came to exactly the same conclusion, that the policy of eradicating discrimination against women simply overrode prisoners' feelings about modesty. And I think we should recognize that the absence of privacy in prisons sometimes reaches the stage at which it is virtually total.

There is more than one maximum security institution in this country where prisoners' cells are subject to constant surveillance by closed-circuit television. So that a prisoner never has real privacy. There is always somebody who can look at that screen and see everything that he or she is doing.

I do not have any doubt that ratification of the equal rights amendment will make that a routine feature, an inevitable feature of our society.

Senator HATCH. I see. Professor Zuckert, what would be your perspective on an alternative ERA amendment which would read as follows. I will read it slowly so you can write it down.

Mrs. ZUCKERT. Thank you.

Senator HATCH [reading]. "Equal protection of the law shall not be denied or abridged by the United States or any State on account of sex." We could replace sex with gender if you would prefer that.

Mrs. ZUCKERT. I think gender is better.

Senator HATCH. I do, too. What would you think of that language as an alternative equal rights amendment language?

Mrs. ZUCKERT. The question of course becomes the difference between protection and rights. And I think the use of that language would—the use of equal protection language would invite the court to apply—and I suppose that would be the intention—the doctrines that it has already formulated in interpreting the equal protection clause as it now stands.

Senator HATCH. Does this appeal to you at all? It would be an equal protection amendment.

Mrs. ZUCKERT. Why protection rather than treatment, for example?

Senator HATCH. You mentioned the symbolic value. You suggested that perhaps the phrase "equal protection" is better than using the generic term of "equal rights" because we already know what equal protection means. It had been imparted with some meaning. Such language would explicitly place the policy of sexual equality into the Constitution, while still continuing to allow reasonable public policy differences.

Ms. ZUCKERT. Let me back up and say I think the problem right now is that the courts have not interpreted very well what equal protection means; there are the three-level standards. Many of the justices have in writing individual opinions expressed dismay at the fact that they are reading the same words in three different ways.

Somehow that does not seem—and I would agree with those justices—a desirable way to interpret the Constitution. Now, the three levels do have precedential value, but since there is so much unhappiness on the Court with that approach, I am tempted to conclude that approach is not apt to last, that the question will be thrown open.

For example, you have been asking about the right to privacy; it is again a kind of speculation, but I suspect that there will be a move to look back at the issues raised by *Roe* in terms of Stewart's concurring opinion when he says this really ought to be understood as an interpretation of the due process clause, deprivation of liberty in that case.

So I have not had a long time to think about it, but I think simply putting the words "equal protection" into the Constitution would not be giving the court very much guidance as to what sort of action Congress wants to endorse and does not want to endorse, because there is so much lack of clarity right now.

Mr. GERARD. Can I stick an oar into this discussion?

Senator HATCH. Certainly.

Mr. GERARD. I have three thoughts. One is, why "on account of sex"? What we have been talking about ever since the equal rights amendment first was proposed is discrimination against women. Why do we not say discrimination against women? That is what it is we are talking about. Why do we not draft an amendment that talks about discrimination against women? I have never heard anybody make a persuasive case for the proposition that men need protection by way of a constitutional amendment. I do not think the case can be made that men need that kind of protection.

So, why not protect women if that is what we are about? Now, that would solve a couple of problems. One problem it would solve is this difficulty that we have of what happens when you classify on the basis of gender.

If we phrased an amendment in terms of discrimination against women, it would also eliminate that ambiguity "on account of sex." Other people have pointed out before that the word sex is basically ambiguous. It can refer either to the sex you do or the sex you are.

When you talk about homosexual marriage—and even four of the strongest proponents of the equal rights amendment concede that that is a possible interpretation of the language—if we eliminated discrimination against women rather than on account of sex, that problem would disappear, too.

Third, it has always been a mystery to me why the proponents of the equal rights amendment insist upon retaining that language "by the United States or by any State." They turn right around and argue that women earn on the average less than men. All the figures they have for that proposition come from private industry.

Well, any amendment limited to the United States or any State is not going to affect that kind of discrimination. Why not just dump that language and make this amendment like the 13th amendment, which applies to individuals and not only to governments.

If that is what we are after, you can propose an amendment that eliminates the limitation "by the United States or by any State."

That would create some marginal uncertainties, as Professor Phil Kurland from the University of Chicago pointed out years ago. If you draft it that way, then there is going to be some debate about what you mean by discrimination against women.

Does, for example, a law that benefits women discriminate against them under the theory that the way women are discriminated against most commonly is by the socialization process, the creation of role models, and that sort of thing.

So any law that discriminates in favor of women would in effect discriminate against them under this analysis. But it seems to me you could add some language to the amendment to eliminate that kind of a problem.

It not only would accomplish what the proponents of the amendment say they want; it would do a lot more than that. It would prevent discrimination in the private sector of the economy, which is where most of this discrimination occurs in terms of wages.

Senator HATCH. I want to thank both of you for appearing here today. If you have no objections, we will put your complete statements in the record since both of you summarized. They are excellent statements and they help us to understand this subject much more clearly.

It is a very difficult subject, yet it is one that we are going to have to seriously confront. Both of you have offered intelligent instruction to this committee in our hearing today.

So, with that, we will recess until further notice. Thank you.

[Whereupon, at 3:35 p.m., the subcommittee was recessed subject to the call of the Chair.]

[The following was received for the record:]

MISCELLANEOUS MATERIAL

VIRGINIA TASK FORCE ON ERA (1974)

Professor A. E. Howard
University of Virginia Law School

* * *

Prisons (Right to Privacy)

The major impact E.R.A. Will have on the prison system is to prohibit separate institutions and the concomitant discrepancy in treatment, facilities, and programs which are attendant to such segregation.

Virginia still maintains separate penal institutions for men and women. Va. Code Ann. § 53-76 (1972 Replac. Vol.). Such segregated institutions would violate the E.R.A. Segregation of institutions on the basis of sex harkens back to segregation based on race. As with race, separate-but equal sexually segregated institutions would not be allowed.[29] With a dual system of institutions comes a dual system of values and treatment. In such a situation, "History and experience have taught us that . . . one group is always dominant and the other subordinate."[30] Although the necessary elimination of separate institutions is conceded by both proponents and opponents, the effect of the E.R.A. within the resultant integrated facility is very much in controversy. It is here that the privacy argument becomes crucial.

Griswold v. *Connecticut*, is the touchstone for all constitutional privacy cases. In that case the defendants, two doctors, were convicted of violating the Connecticut birth control law by giving medical advice regarding contraceptive methods to married couples. The Court held the statute unconstitutional as being a violation of the privacy guaranteed by certain of the Bill of Rights and the penumbra surrounding them. However, the privacy so protected may not be as broad a concept as the proponents of the E.R.A. conceive.

The decision was founded on the First, Fourth, Ninth and Fourteenth Amendments. The Fourteenth, of course, merely was used to apply the other Amendments to the State. The Ninth Amendment, the Court stated, stressed that there are other fundamental rights held by the people which are not specifically ennumerated in the Bill of Rights. These rights are to be determined by reference to the "traditions and collective conscience of our people"[32] and with our "experience with the requirements of a free society."[33] A right of marital privacy was asserted to be such a right.[34] A broader right was not asserted. However, at the heart of the opinion were the rights emanating from the First and Fourth Amendments.

One prong of the decision was the right of association which had been established by earlier opinions as inhering in the First Amendment's freedom of speech. Emanating from this right is a zone of privacy not to be violated by the government. Marriage was held to be an association, the privacy of which is protected by the First Amendment. Marriage, said the court, "is an association for nas noble a purpose as any involved in our prior decisions."[35] As such, the marriage relationship is protected from invasion by the government.

Another prong of the decision is the Fourth Amendment's prohibition of unreasonable searches and seizures. Because the Connecticut statute banned the use of contraceptives, the police may well be required to invade the marital bedroom to secure evidence of the crime.[36] Such action is reprehensible and "repulsive to the notions of privacy surrounding the marriage relationship."[37] It is into this zone of privacy, created by the Fourth Amendment, that the government is constitutionally forbidden to go. Thus a penumbra of rights of privacy created by specific constitutional guarantees compelled invalidation of the statute.

The privacy concepts recognized by the Court in Griswold were linked to specific guarantees of the Bill of Rights.[38] Without a specific guarantee in the Constitution, the Court has not recognized a general right of privacy. Whether, therefore, a privacy exception may be read into E.R.A. must be only a legal hypothesis.

In Griswold, the Court, in support of a right of privacy emanating from the Fourth Amendment, cited the following quote from Boyd v. United States,[39] holding that the essence of the offense of violating one's Fourth Amendment rights is

> the invasion of his indefeasible right of personal security, personal liability and private property, when that right has never been forfeited by his conviction of some public offense."[40]

In regard to prisoners, to what degree have they forfeited the rights of privacy otherwise attaching to private citizens? There has been a flurry of litigation regarding prisoners' rights, but no definitive statement has been made. However, it is not radical to presume that prisoners maintain a minimal level of human dignity which is constitutionally protected and which will support a right of privacy.

The concept of privacy proposed by advocates of the E.R.A. is closer to the tort concept of privacy which has developed in the United States.[41] This concept of privacy is based upon dignity; in fact, privacy may be seen as a shield of human dignity opposing the notion of human fungibility which lies below the surface of authoritanianism. This notion of privacy may well reside in the Ninth Amendment and in the concepts of liberty enshrined in the Fifth and Fourteenth Amendments; however, the Supreme Court has not specifically so held.[42]

If the privacy asserted by the proponents of the E.R.A. is of the kind described above, then its operation is broader than assumed and can not be limited to prohibition of sexual integration. A constitutional right of privacy founded on human dignity is an individual right and operates vis-a-vis other individuals and the government not just vis-a-vis individuals of the opposite sex. However, it is just this kind of privacy which is denied prisoners by the nature of the penal institution.[43] Two aspects of present penal life display this deprivation: regimentation and forced exposure.[44] Regimentation manifests the idea of human fungibility, so that "men can be moved according to an umambiguous time schedule through the sequence of points in a daily activity cycle."[45] Prisoners are always in the presence of other prisoners or in the sight of authotiries; there is no cloak of privacy which he can pull around himself.

Forced exposure is evident in mass denudation rituals, exposure before spectators (prisoners and guards), exposure during performance of bodily functions (open shower and toilet facilities), and constant surveillance.[46] The prison eliminates our need of "social distance",[47] and forecloses the idea of individuality and individual rights. "Rights can not be imposed upon a system built around the presumption of their absence."[48] Such is the existence of privacy, in the general sense, in today's prisons.

Compare those conditions with this statement:

> "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity."[49]

Also, the Ninth Circuit Court of Appeals, in York v. Story,[50] stated: "We can not conceive of a more basic subject of privacy than the naked body." This was a case involving a complaintant of a crime, not a prisoner. Were these concepts to be applied to the circumstances described above, the prison procedure would be drastically revised. This may well be a desired change, but the point is that short of giving such a right of privacy to every prisoner, giving it to sexually classified groups might run afoul of the E.R.A. since the right to be protected, privacy, applies to all individuals vis-a-vis all other individuals and not on a female-male classification. The right is an individual right and can not be violated merely because those who view the violation are members of the same sex.

Thus, there has to be a dramatic development in constitutional law before a general right of privacy can be established as being a constitutional right. Then, such a right will require the sanctification of the privacy of all persons vis-a-vis all others and not just in terms of the opposite sex. Finally, such a right will have to be extended to prisoners and a decision made as to the degree of liberty lost by imprisonment. If all liberty is lost, then even existing opinions[51] which might have found a basis for the required extention will not be helpful. In short, the right of privacy claimed by advocates of the E.R.A. is not a reflection of existing law and may or may not be accurate prophecy.

It is clear, then, that the E.R.A. would require sexually integrated prisons but not so clear as to the degree of integration required within each institution. However, it seems that a prison could invoke regulatory schemes which keep inmates separate for certain purposes. As the prison is required to protect the health and welfare of prisoners,[52] steps could be taken so as to minimize the probability of injury. Such regulation would have to be grounded on probable facts and be limited in operation to circumstances where injury is quite probable. Again, such regulations must be designed to protect both sexes, for instances, protection from heterosexual or homosexual assaults. Therefore, the simple segregating of the sexes for sleeping or bathing purposes would be insufficient and would be discrimination in the guise of protection. All prisoners are entitled to protection, not just one sex from another.

The equalization of facilities, treatment, and programs for all prisoners, regardless of sex, raises the question of whether to upgrade all institutions to meet the highest level now in operation or to decrease the highest level to a medium level. The state can do either, though the E.R.A. is intended to increase benefits given one group to all groups.[53] The economic burden involved in increasing benefits given women may be too great to justify such increase, therefore, a decrease in benefits may result in the smaller group. If men, being the larger group, have benefits not enjoyed by women, it would be little problem to extend such benefits.

Prisons would still be able to offer certain programs and use certain treatments which are not available to all prisoners. However, the method of classifying prisoners for purposes of such programs must be sex-neutral and based on otherwise reasonable principle of classification.[54] These classification standards would have to be applied on an individual basis to avoid the group classification syndrom which would automatically classify all women the same, e.g., as minimal security risks.[55] Psychological tests and other classification tests must be reviewed so as to eliminate any sex-bias which may be inherent in them.

A final classification problem is the question of placing one woman in an otherwise male institution, should that situation arise.[56] In such a case, the Eighth Amendment might have application.[57] The problem here would be the deprivation of the womans right to have relationships with other women and a possible exclusion of the woman from programs of activities which appeal to or are designed for men. It seems that in such a situation, the woman could be placed in the institution next-best suited as per her classification status. Such action could be justified on the Eighth Amendment and also as being applied to both men and women in similar circumstances and thus not an illegally discriminatory act.

The major focus of post-E.R.A. concern in prison administration in Virginia is in the enforcement of non-discriminatory laws and regulations. Changing laws is easier than changing attitudes and long standing practices of sexual discrimination. This is especially true in the work release program.

Statutes. As was noted earlier, Va. Code Ann. § 53-76 (1972 Repl. Vol.) creates separate penal institutions for men and women. Such statutory discrimination must be eliminated by consolidation of the institution. Va. Code Ann. § 53-100 (1972 Repl. Vol.), states that all male prisoners will constitute the Bureau of Correctional Field Units. This seems to have been an oversight in the 1975 attempt to neutralize these Code sections. However, all such units will have to be sex-neutral in their constituency. Sex-neutrality has actually been accomplished in the above unit by Va. Code Ann. § 53-103 (   ), which eliminates the word "male" and retains "persons".[58] Section 53-100 must be revised in such manner.

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[Footnotes omitted.]

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT: THE STATE EXPERIENCE

WEDNESDAY, SEPTEMBER 19, 1984

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:36 a.m., in room SD–124, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Staff present: Stephen J. Markman, chief counsel and staff director; and Leslie Leap, clerk.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator Hatch. Ladies and gentlemen, this marks the 11th day of hearings by the Subcommittee on the Constitution on the proposed 27th amendment to the U.S. Constitution, the equal rights amendment.

As with each of our earlier hearings, we believe that today's hearing will enable us to better understand the long-term implications of the ERA and to assess the real world impact of the 52 words in this provision.

It is my strong feeling that this set of hearings has shifted the debate over the equal rights amendment from platitudes and slogans to the discussion of concrete public policies that will be required if the ERA does become part of our Constitution.

We are privileged to have with us today two outstanding constitutional scholars. Prof. Grover Rees is a professor of law at the University of Texas Law School where he has written extensively on constitutional issues. Early last year, he delivered testimony on this subject before the House Committee on the Judiciary.

Also appearing with us today will be Prof. William Kristol of the Harvard School of Government. Professor Kristol has also authored a wide variety of articles on the Constitution and American Government.

We look forward this morning to hearing from both of our witnesses. Let us start with you, Professor Rees.

STATEMENT OF PROF. GROVER REES, UNIVERSITY OF TEXAS SCHOOL OF LAW; AND PROF. WILLIAM KRISTOL, HARVARD UNIVERSITY SCHOOL OF GOVERNMENT

Professor Rees. Thank you, Mr. Chairman.

I have been asked to review some of the cases decided under State equal rights amendments with an eye toward discerning the implications for the effects of the Federal equal rights amendment if it were adopted.

I have decided to concentrate on four principal areas because I think those are the areas that are principally in dispute between the opponents and the proponents of the equal rights amendment.

The first of these questions is whether the equal rights amendment would, if it were enacted, take away many of the legal benefits that women have traditionally enjoyed.

The second question is whether the equal rights amendment would make unconstitutional certain kinds of separate but equal treatment for men and women by applying the standard of judicial scrutiny that is currently applied to race classifications.

The third question is what impact, if any, the Federal equal rights amendment would have on the question of abortion and abortion funding.

Finally, aside from whether the equal rights amendment would do any of these controversial things, there is the question whether it actually would do any of the things it is supposed to do, particularly whether it would have any effect on the disparate economic situation of men and women in the United States.

With increasing frequency, proponents of the equal rights amendment have cited the State ERA experience both to show that the opponents' dire predictions are unfounded—because after all we do not have coed restrooms in any of the 16 States or 17, depending on how you count, that have State equal rights amendments—and to suggest that the Federal ERA will produce tangible benefits for women.

My review of the State experience under ERA's, however, suggests two conclusions that are at some variance with these assertions.

First, the cases are of doubtful probative value on what effects a Federal equal rights amendment to the U.S. Constitution would have.

Second, to the extent that the cases are of probative value, they tend to lend support to claims of the opponents about the effects of the ERA rather than to claims of the proponents.

There are a number of reasons why the cases cannot simply be transferred absolutely from the State level to the Federal level.

First, the wording of the State equal rights amendments varies widely. There are only six or perhaps seven State equal rights amendments that have language that is substantially similar to that of section 1 of the Federal equal rights amendment.

Second, the legislative history of the State equal rights amendments is dramatically different from the legislative history that now exists for the Federal equal rights amendment. There was little or no legislative history for most of the State equal rights amendments, and there is, of course, a great deal of somewhat conflicting legislative history for the Federal equal rights amendment. When you are doing legal research into an area of the law, it always seems as though there are zero cases on your point or 253. There is most often just about zero legislative history for a State equal rights amendment and more like 253 conflicting sources on what the Federal equal rights amendment means.

Third, the States have varied widely in the standard of review that the courts apply to sex-based discrimination under their State equal rights amendments. Some States only apply the rational basis test which is, of course, a more permissive standard even than the Federal courts currently apply under the 14th amendment. Other States apply something like what the Federal courts currently apply to sex discrimination under the 14th amendment. Some States seem to apply a strict scrutiny standard, which is what the Federal courts currently apply to race. Only two State courts actually apply what would probably be the standard of review under the Federal equal rights amendment, the so-called absolute standard with perhaps a limited exception for unique physical characteristics.

Of all the 17 States that have State equal rights amendments, only the Pennsylvania and Washington courts have applied something like an absolute standard, and although the Washington court has announced that it applies such a standard, it sometimes seems to shrink from the implications of that standard. So Pennsylvania may be the only State that we can use as an accurate indicator of what the equal rights amendment might do.

Fourth, a number of controversial issues having to do with the Federal equal rights amendment are simply not State issues. For instance, take an area that proponents and opponents tend to agree about: the military draft would almost certainly have to be on a sex-blind basis, but this is something that cannot be tested under the State equal rights amendments because the States do not draft people.

Fifth, it is important to remember that State judges tend to be, although not universally so, somewhat more conservative and more responsive to political pressures, to popular sentiment, than Federal judges. This is partly because many State judges are elected. Federal judges are apppointed for life. It also may have something to do with the nature of federalism, with State judges being closer to the people. Therefore, we could probably expect a more expansive interpretation of a Federal equal rights amendment from the Federal courts, if past experience is a reliable indicator.

Also, those State judges and particularly litigants who do favor an expansive view of the Federal equal rights amendment may be holding back at this point on arguing for some of the more creative implications of the State equal rights amendments, in order not to give opponents of the Federal equal rights amendment ammunition to use against proposal and ratification.

But the final reason that the cases are of limited probative value is simply because they differ from State to State. On each issue the State courts may reach two conflicting results with many different rationales.

However, to the extent that the cases are probative, as I've said, they lend support to the claims of equal rights amendment opponents in all four major areas of dispute.

First, a number of decisions have struck down laws affording preferential treatment to women. Indeed, I think it is an important statistic that the successful plaintiffs in State equal rights amendment actions across the country have overwhelmingly been men.

The presumption, for instance, of the husband's obligation to support his wife has been struck down in Pennsylvania and Maryland. The husband's obligation to pay alimony pendente lite has been struck down in Pennsylvania as has the institution of divorce a mensa et thoro, that is to say, a separation from bed and board which only the wife was able to obtain.

The maternal preference in child custody has been struck down in Pennsylvania, Washington, Maryland, and Illinois. The primary paternal obligation to pay child support has been struck down in Pennsylvania, Washington, and Maryland.

The presumption, where the wife has given over her property to her husband, that he has dominated her, which has helped wives to recover property at divorce, has been eliminated in the State of Maryland.

Indeed, where these traditional sex-based preferences for women have been upheld it's been for one of three reasons. First of all, because the State was applying a rational basis test, something that almost certainly would not happen under the Federal equal rights amendment. Second, because the State courts were able to find implied in some other law a burden on women or a benefit to men that parallelled the burden on men or the benefit to women given by the challenged statute, thus bringing in through the side door the elimination of the preferential treatment for women that the courts would not directly announce by striking down the challenged statute. Third, and most disturbing to me as a student of the Constitution, sometimes the courts are able simply to misstate the facts of the case, to ignore things that everybody knows. The most obvious example of this is that several State courts have held that it is not unconstitutional in a certain case to give child custody to the mother based on what seems to be a strong judicial preference for mothers over fathers. They dismiss as mere statistical allegations the impressive evidence that courts overwhelmingly give child custody to mothers or that they overwhelmingly give alimony to divorced women and not men.

The courts in Colorado have been particularly fond of this lost analysis. They say, "If there were a law that said you had to give child custody to women preferentially or alimony to women preferentially, then we'd strike it down. That would violate the Constitution. But the mere fact that judges happen to do it all the time is not something of which we can take judicial notice."

This is strikingly parallel to Justice Powell's opinion in *Bakke,* which I found deeply disturbing. Justice Powell said, in essence you cannot have an open quota system, but if you do it the way Harvard does it, by means of what everyone knows to be a surreptitious quota system, then we will not strike it down.

In other words, it is OK to do things that violate the announced constitutional standard as long as you do not make too much noise about it. Quite aside from the merits of whether women ought to have preference in child custody, I find this a disturbing thing for courts to do.

There are several other areas outside of the family law area in which preferential treatment of women has been challenged. The major area in which preferential treatment for women has sometimes been upheld has been in sex-based criminal laws, notably rape statutes in which the man is defined as the offender and the woman is defined always as the victim. Defenders of these statutes have argued that they are based on unique physical characteristics. However, much more often, the courts actually simply rely on rational basis tests.

One of the major things that proponents of the Federal equal rights amendment say that it will do is to change the court's holding in the *Michael M.* case, which upheld a sex-defined statutory rape law. So these cases at the State level have very little probative value because almost everyone agrees that the Federal ERA would require facially neutral sex offender statutes.

Another case in which there was preferential treatment for women and it was upheld, although very narrowly, was in the State of Washington where a law said that political parties had to have an equal number of male and female officeholders, the national committeeman and national committeewoman system that is traditional, of course, in the political parties of the United States.

That was a very close decision. The court emphasized a peculiar feature of the Washington equal rights amendment which says that men and women have not only equal rights but also equal responsibilities. But the very fact that a law like that could be challenged, I think, shows that all preferential treatment for women would be suspect. Whether that is a good thing or a bad thing I am not here to say. However, this is a claim that the opponents are making, and that the proponents have sometimes seemed to deny, and I think the State cases bear out this assumption of the opponents.

The second contested area is that of separate but equal treatment of men and women. The allegation that many opponents have made is that, for instance, you would not be able to have separate boys' and girls' football teams or wrestling teams or tennis teams. This allegation has been almost uniformly upheld. The States of Colorado, Washington, Pennsylvania, and Massachusetts all held that it violates the State equal rights amendment to have separate teams for boys and girls.

In some of those cases the courts focused on the fact that there was no equal team for the other sex. But in no case did they make this the sole basis of their holding. In each case they either reserved the question what would happen if it was truly separate but equal or they simply said that you cannot have separate but equal teams. That violates the State equal rights amendment. Illinois, however, did uphold separate but equal boys' and girls' teams.

The other case in this area was the Pennsylvania case striking down separate boys' and girls' public schools. The court rejected an argument that many people thought might be permissible under the Federal ERA, which is that keeping adolescent boys and girls in separate educational institutions is a question of educational philosophy that has very little to do with thinking that one sex is inferior.

It simply recognizes the fact that adolescents tend to act differently and perhaps to learn differently when they are in the presence of members of the opposite sex than when they are not.

And yet Pennsylvania, perhaps the only State that is a reliable indicator of what will happen under the Federal ERA, held that that separation of boys and girls in public schools was unconstitutional. Now, there were factors, as there will almost always be, that the court could point to in that case. The girls' school did not have as large a library and there was more of an emphasis on science in the boys' school. But the court did not rest its holding on that point. The court said simply that separate institutions for boys and girls would violate the State ERA.

Another very significant recent case in the area of separate but equal institutions is the Maryland case of *Bainum* v. *Maryland* striking down the tax exemption given to the Burning Tree country club. This opens up a Pandora's box of possibilities since religious institutions, for instance, get tax exemptions and the implications of the *Bob Jones* case are being borne out, I think, in this case. Anybody who gets a tax exemption will become an effective State actor, and if sex is a strict scrutiny classification or an even stricter than strict scrutiny classification then we will see institutions such as religious institutions, all kinds of private clubs, including, by the way, private women's exercise clubs and so forth, being forced to admit members of the opposite sex or lose their tax exemptions.

The third contested area is the question of abortion. The committee has already had extensive testimony on this. I will simply emphasize the fact that in Hawaii and Massachusetts the American Civil Liberties Union, prominent backers of the equal rights amendment, argued that State ERA's clearly ought to make sex a suspect classification, and therefore, result in the striking down of laws that funded some medical operations but not abortions. In the Connecticut case, the judge commented favorably in dictum on this argument and finally in the Pennsylvania case the court held as one of several alternative holdings that the Pennsylvania equal rights amendment mandated abortion funding if there was going to be any funding of medical operations.

A closely related set of cases to the separate but equal and abortion cases are the unique physical characteristics cases, and there is wide disagreement even among proponents of the equal rights amendment about what that unique physical characteristics exception means. The famous Emerson, Brown, Freedman and Falk article maintained that there would be an absolute standard for everything but unique physical characteristics and a strict scrutiny standard which is, as you know, an awfully tough standard, for unique physical characteristics. ERA proponents have argued, for instance, that pregnancy does not count as a unique physical characteristic. The State cases are divided on the question of unique physical characteristics. For instance, there are a number of cases where either for obscenity reasons or for some other reason the States treated a women who leaves her breasts uncovered differently from a man who leaves his chest uncovered.

And in Hawaii, the courts upheld a law that said that women visitors in prisons had to wear brassieres but men did not. That was all right. In Washington, however, we have two conflicting cases. In *Seattle* v. *Buchanan*, they upheld a public lewdness statute that said that women couldn't go topless and, by implication, men could. However, in *Bolson* v. *Liquor Board,* they construed a statute that forbade topless dancing to include topless dancing by men as well as by women. So there is at least some possibility that breasts would not qualify as a unique physical characteristic.

The big question, having to do with unique physical characteristics and separate but equal, though, is whether courts would apply the *Loving* v. *Virginia* analysis to sex. *Loving* v. *Virginia,* was the case in which the Supreme Court said that a State could not have a law only blacks could marry blacks and only whites could marry whites. Now, Virginia argued that that was separate but equal treatment. We punish a black who marries a white just as much as we punish a white who marries a black. The court said, "Nice try but no cigar."

However, in the *Singer* v. *Hara* case in Washington, a State that believes itself to be applying strict scrutiny or perhaps even absolute scrutiny, the court used a very similar analysis to uphold the State's statute providing that only men could marry women and only women could marry men. They simply rejected the *Loving* analysis as applied to sex. They said that men and women are being treated equally as long as we forbid marriages between gay men just as strictly as we prohibit marriages between gay women. This, of course, begs the question. It seems to me that the proper analytical framework is to ask whether, if John wants to marry Jim, is he being treated equally to Mary, if she wanted to marry Jim? The answer is clearly no.

That is the answer that the court adopted in *Loving* v. *Virginia* for race. The question is whether sex is really different from race. I think it is. I think most Americans think it is. The question is whether the equal rights amendment would allow the courts to continue to think that it is.

Now, *Singer* v. *Hara* suggests that the answer to this question is yes. However, in the case of *Laspino* v. *Rizzo* in Pennsylvania—the State, again, that seems to be most often faithful to the standard of review required by the Federal equal rights amendment—the court struck down, based on the *Loving* analysis, an ordinance providing that men could not massage women in massage parlors and vice versa. This, of course, obviously being a law designed to get at prostitution. One of the things the court said was that the law, of course, still permitted homosexual prostitution, and therefore, treated heterosexuals differently than it treated homosexuals. But the major argument was that this was simply a violation of the *Loving* standard which ought to apply to sex; that is, if a man wants to massage a woman, he cannot be treated differently from a woman who wants to massage a woman or to get a massage from a woman. Well, if that is true, it ought logically to apply to marriage, an institution that is much more important than massages in our culture and where a homosexual could argue that he was being stigmatized as was the case in many of the early race cases, where a homosexual could point to concrete economic disadvantages that he might suffer simply as a result of being male and wanting to marry a male.

So that is a very open question under the State equal rights amendments. Those two cases point in opposite directions.

The final point is that there is very little evidence in the State cases that the equal rights amendment is going to have anything to do with the problem of economic disparity between men and women.

There are a couple of cases which do strike down some different employment conditions for men and women, but, of course, that result probably would have been obtained under the 14th amendment, under the Court's current standard.

There were no other cases until very recently, and the recent case in Washington enacting the comparable worth standard is really the only evidence we have on that. Now, certainly the comparable worth standard does represent a significant change. There is some question in my mind whether it is a change that the people who have supported the equal rights amendment, that is to say the legislators, and so forth, would want. It is a very radical change which substitutes for market forces the decrees of bureaucrats and judges about what certain occupations are worth. It is no longer possible to say after the Washington case that the equal rights amendment would do nothing about the problem of——

Senator **Hatch**. Was the ERA a factor in that case?

Professor **Rees**. The State ERA.

Senator **Hatch**. Was the State ERA a factor in the Washington comparable worth case?

Professor **Rees**. I believe it was. I do not have the case in front of me now. I have read it. I can check that and submit a correction in writing if I'm wrong.

However, the fundamental problem on the economic disparities issue is that under the 14th amendment, the courts have already held that it violates equal protection for the State actually to treat men and women differently in terms of having absolute categories for men and women. On the other hand, the State equal rights amendments generally, like the Federal equal rights amendment, are not supposed to apply to private action, and if the discrimination out there is in the private sector which as a matter of law it has to be—as a matter of law, there cannot be any discrimination in the public sector already under the 14th amendment, under title VII, under the other civil rights laws—then it is difficult to see how the equal rights amendment could do anything at all about the problem of women only making 59 cents for every dollar that a man is supposed to make.

And the State cases do tend to bear out the suggestion that the equal rights amendment will have very little effect on the one question that the proponents suggest it is really about.

Now, in closing, I would just like to suggest that the cases do not prove anything one way or the other. What they do suggest is that there is a significant possibility that the equal rights amendment could do rather dramatic things that many Americans, including many who are supporting the equal rights amendment, would not like.

Now, of course, if the equal rights amendment is ratified and lawsuits are brought suggesting that the equal rights amendment means these things, I and other lawyers will be in court arguing that the equal rights amendment does not do these radical things. We will be saying to the proponents, "You promised that this was going to be an economic discrimination amendment, that it was not going to have anything to do with abortion, that it was not going to have anything to do with separate but equal treatment, that it was not going to restructure society dramatically."

Senator HATCH. Not all of them have promised that, unfortunately. That is the problem.

Professor REES. That is the problem. The problem is that beneath the surface promises——

Senator HATCH. I think a majority of the proponents feel otherwise on most of those issues.

Professor REES. The promise was in the impression that they tried to give, and one of the things I did just finish reading, Senator, was your questioning of Professor Freedman before this committee where she said time and again that the equal rights amendment would have no practical impact on the question of abortion, and yet she refused to say that it ought not to have any philosophical impact.

What she did was simply to fall back on a radical version of legal realism that says essentially that the courts will do what they want to do with or without the equal rights amendment, and if they wanted to provide abortion funding, they would have done it already, and if they want to abolish the right to abortion, they can do it with or without the equal rights amendment. That is true.

Senator HATCH. Afterwards, when the court does exactly that, assuming that the equal rights amendment passes, Professor Freedman will just say, "Well, I was wrong." She might not even bother to say that.

Professor REES. What she will say is "I was predicting whether it would have a practical effect. I was never saying that I would not argue that it would have an effect, and I am glad I was wrong."

The sides will switch. The opponents will say, essentially, "You promised it was going to be a narrow technical perfecting amendment," and the other side will say, "That was then. This is now. We all know that constitutional amendments are to be construed broadly by the courts to keep in tune with the times."

It seems to me that the question is not whether we can prove exactly what the amendment is going to do but whether it is likely that the benefits outweigh the risk of harm.

The question is whether you want to give tools to very skillful lawyers who will be able to argue all of these things. I suggest at the very least the State cases suggest that the equal rights amendment will be a very plausible tool to be used in court by organizations that are already in place waiting to start using that tool to restructure society dramatically along what may be rather frightening lines.

Senator HATCH. Thank you. I am going to have to recess for a few minutes to go to a Labor and Human Resources Committee meeting to see if we can start working on the Civil Rights Act of 1984. If we cannot, I will come right back down. If we can, I will probably have to have counsel finish the hearing. Please forgive me for that, but in these last few weeks, there is really no way to avoid these conflicts.

Professor Kristol, I am very interested in what you have to say as well. So what I will do is recess for approximately 10 minutes.

We will then try to get back down here, assuming we do not have a quorum at this other meeting.

[Whereupon, a short recess was taken.]

Senator HATCH. We will resume this committee hearing. I apologize for the interruption, but we are working on another very important subject called the Civil Rights Act of 1984; through eight committee markups, the proponents have only come to two or three of them. Now they are attempting to bypass the committee system and bring this bill directly to the floor without committee hearings.

Professor Kristol, we apologize for holding you up, but we do appreciate your patience and will take your testimony at this time.

Professor REES. Senator, could I just add one thing that I have had a chance to correct since the recess? I have not had a chance to go back and read that Washington case to refresh my recollection. In fact, I was originally prepared to make a statement that the equal rights amendments at the State level had virtually no effect on economic impact, and at the last minute I remembered the Washington case.

You are quite right, however. That was a title VII case. I believe there may have been some subliminal impact. The Washington court have been among the most active in construing their State equal rights amendment. But although I will check it, I do not believe there was any explicit reliance on the State equal rights amendment.

Senator HATCH. If you would doublecheck that so you could make a definitive statement it would be helpful.

[The prepared statement of Professor Rees and his responses to written questions of Senator Hatch follow:]

Statement of Grover Rees III before the Subcommittee on the Constitution, United States Senate Committee on the Judiciary, September 19, 1984.

The Subcommittee has requested that I review some of the cases decided under state equal rights amendments with an eye toward discerning any implications for the effects of the federal Equal Rights Amendment if it were adopted. I have reviewed such cases in four areas that seem to be the principal areas of dispute or confusion.

The first question is whether the Equal Rights Amendment would, if it were enacted, take away many of the legal benefits and preferences that women have traditionally enjoyed.

The second question is whether the Equal Rights Amendment would make unconstitutional certain kinds of "separate but equal" treatment of men and women, by applying to such classifications a standard of judicial scrutiny at least as strict as that currently applied to race classifications.

The third question is what impact, if any, the federal Equal Rights Amendment would have on laws dealing with abortion, abortion funding, and related issues.

The fourth question is whether the Equal Rights Amendment would have significant effects on the disparate economic situation of men and women in the United States.

Proponents of the federal ERA have cited with increasing frequency the state ERA experience, both to show that the opponents' dire predictions are unfounded and to suggest that the federal ERA will produce tangible benefits for women. My review of the state cases, however, suggests two conclusions that are at some variance with these assertions: First, the experience under state ERAs is of doubtful probative value on what effects a federal Equal Rights Amendment would have. Second, to the extent that the cases are of probative value they lend more support to the claims of ERA opponents than to those of the proponents.

I. The Limited Probative Value of the State Cases.

For a number of reasons, it is wrong to assume that cases decided under state equal rights amendments will automatically generate reliable predictions of how the federal courts would interpret an Equal Rights Amendment to the United States Constitution:

First, the wording of the state equal rights amendments varies widely. There are only six, or perhaps seven,[1] state equal rights amendments whose language is substantially similar to that of section one of the federal Equal Rights Amendment now under consideration by Congress.

Second, the legislative history of the state equal rights amendments is dramatically different from the legislative history that now exists for the federal Equal Rights Amendment. There was little or no legislative history for many of the state equal rights amendments. There is a great deal of legislative history for the federal ERA, although the sources frequently contradict one another and are therefore of doubtful value.

Third, the states have varied widely in the standard of review that courts have applied to sex-based discrimination under state equal rights amendments. Some state courts apply the "rational basis" test, which is more permissive than the test the federal courts currently apply to sex discrimination under the fourteenth amendment. Other state courts seem to interpret their state ERA as requiring a standard almost identical to the standard the federal courts use in fourteenth amendment sex discrimination cases, and still others apply a "strict scrutiny" test similar to that applied in fourteenth amendment race discrimination cases. Only Washington and Pennysivania seem to apply the "absolute" standard of review that the federal ERA was apparently intended by its original proponents to bring to sex discrimination cases,[2] and the Washington Supreme Court seems to shrink from some of the implications of such a standard.[3]

Fourth, a number of controversial issues having to do with the federal Equal Rights Amendment --- such as the question of all-male combat forces, and the question whether section two of the ERA would shift substantial control over family law from state legislatures to Congress --- have no close analogues at the state level.

Fifth, state judges seem on the whole to be somewhat more reluctant than federal judges to interpret vague statutory or constitutional language so as to require dramatic changes in traditional social and political institutions. This is partly because many state judges are elected, whereas federal judges are appointed for life. Moreover, those state judges who would favor more expansive interpretations of constitutional provisions banning sex discrimination --- and, even more likely, litigation groups who favor such interpretations --- may be reluctant to argue for the most dramatic implications of state equal rights amendments in order not to give opponents of the federal ERA any ammunition to use against proposal and ratification.[4]

Finally, the state cases are of limited probative value simply because results vary widely from state to state. On each issue the state courts may reach two conflicting results with many different rationales.

However, in my opinion the state cases do lend some support to the claims of Equal Rights Amendment opponents in all four major areas of dispute.

II. Preferential Treatment of Women.

A number of decisions under state ERAs have struck down laws affording preferential treatment to women. Indeed, it is important to notice that the plaintiffs asserting rights in state equal rights amendment actions have overwhelmingly been men.[5]

Most of the challenged laws have been in the area of family law. The presumption that a husband is obliged to support his wife, for instance, has been struck down in Pennsylvania and Maryland.[6] A Pennsylvania court also declared unconstitutional the husband's obligation to pay alimony pendente lite and the institution of divorce a mensa et thoro or separation from bed and board, which was available to wives but not to husbands.[7] The maternal preference in child custody has been struck down in Pennsylvania, Washington, Maryland and Illinois.[8] The primary paternal obligation to pay child support has been struck down in Pennsylvania, Washington, and Maryland.[9] The presumption of the dominance of the husband in cases where the wife has made a gift of property to the husband has been declared unconstitutional in Maryland.[10]

Where traditional preferences for women have been upheld, courts have generally given one of three reasons. Often the courts have applied the rational basis test, which would almost certainly be inapplicable under a federal ERA.[11] In other cases where a state law clearly imposed a burden on men or bestowed a benefit on women, the courts were able by creative construction of some other law to find an implied burden on women or benefit to men that provided a measure of symmetry.[12] This amounts to bringing in through the side door the elimination of preferential treatment for women that the courts were reluctant to achieve openly by declaring the challenged preference to be unconstitutional.

The third technique courts have employed to uphold challenged preferences for women is to find ways to ignore or deny the fact that such preferences exist. For instance, courts have rejected the contention that statistical evidence of overwhelming judicial preference for women in child custody and alimony cases is inadmissable to show that the laws are being administered in a discriminatory fashion.[13] If the legislature created such a preference by passing a statute, these courts would strike it down; but when judges enforce the preference without benefit of a statute, appellate judges uphold it. Quite aside from the merits of the question whether women ought to be preferred in custody and alimony cases, this insistence that the preference be created surreptitiously is disturbing. If we cannot live with sex-blind legal standards in some areas, it would be better to admit it than to make believe we are doing so.

Outside the family law area, classifications by sex in criminal laws have generally been upheld.[14] Rape statutes traditionally define offenders as men and victims as women. These laws can be defended on the ground that they simply recognize unique physical characteristics of men and women, but in fact the state courts seem to have upheld them by applying a rational basis test. Since proponents of the federal Equal Rights Amendment seem to be in wide agreement that the ERA will require the reversal of the court's holding in the Michael M. case,[15] which upheld a sex-defined statutory rape law, the state ERA cases are of little predictive value in this area.

III. "Separate but Equal" Treatment of Men and Women.

The second contested area is the "separate but equal" treatment of men and women. Opponents of the ERA have frequently alleged that it would require the elimination of separate all-boys' and all girls' sports teams. This prediction has been borne out in state ERA cases. Courts in Colorado, Washington, Pennsylvania, and Massachusetts have held that separate teams for boys and girls violate the state equal rights amendments,[16] with only Illinois upholding separate teams.[17] All of these cases rested to some extent on the courts' finding that boys' and girls' teams are not in fact "equal."[18] But this hardly suggests a solution to the problem, since inequality will exist so long as male athletes typically outperform female athletes. If women's teams are prohibited from discriminating by sex, many of them will presumably degenerate into second-string men's teams.[19]

In an important related case, the Pennsylvania state courts declared it unconstitutional for Philadelphia to maintain separate high schools for girls and boys.[20] The court in that case rejected an argument that many people thought might be permissible under the federal Equal Rights Amendment, which is that maintaining separate educational institutions is a question of educational philosophy that need not have anything to do with believing one sex or the other to be inferior. One might instead recognize the fact that adolescents tend to act differently, and perhaps to learn differently, when they are in the presence of members of the opposite sex than when they are not. Apparently, however, this argument is impermissible under an "absolute" standard of scrutiny such as will probably be imposed under the federal ERA.[21]

Another significant case involving sex-segregated institutions is that in which a Maryland court declared it unconstitutional for the state to grant a tax exemption to an all-male country club.[22] By treating the state's action in giving a tax exemption as equivalent to active discrimination by the state, the Maryland court dug into the Pandora's box that the United States Supreme Court opened in the *Bob Jones* case.[23] If the *Bob Jones* rationale applies to sex discrimination under equal rights amendments, then countless institutions --- including, for instance, women's colleges and many religious institutions --- would face loss of their tax exemptions, even though the state itself does not discriminate between all-male, all-female and coeducational institutions in awarding exemptions.

One instance that looks like a "separate but equal" law but may be better analyzed as a preference for women was the Washington law providing for an equal number of male and female officeholders in political parties.[24] The court upheld the law by a narrow margin, emphasizing a peculiar feature of the Washington equal rights amendment which says that men and women have not only equal rights but also equal responsibilities. The court seemed to recognize that without the challenged provision, most party offices would be held by men. By ensuring that women were equally represented, however, the court reasoned that the law encouraged "equal responsibility" for women in political party management.

IV. Abortion and "Unique Physical Characteristics."

The third contested area is abortion and related questions. In several cases the argument has been made that a state equal rights amendment requires a state to fund abortion on the same basis as it funds other operations. If sex is a "suspect classification" and if pregnancy is a sex-related condition, the argument seems persuasive.[25] In Hawaii and Massachusetts the court avoided construing the state ERA by applying the same reasoning to another constitutional or statutory provision.[26] In Connecticut the court decided the case on other grounds but commented favorably on the argument that the state ERA required abortion funding.[27] And in Pennsylvania the court construed the state ERA as requiring that abortions be funded.[28] The Pennsylvania court also construed other constitutional provisions to the same effect.

The "separate but equal" cases and the abortion cases raise questions about the scope of any "unique physical characteristics" exception to laws against sex discrimination. There seems to be some disagreement among proponents of the Equal Rights Amendment about what the unique physical characteristics exception means.[29] Professors Emerson, Brown, Freedman and Falk maintained in their Yale Law Journal article that where a unique physical characteristic was involved, sex discrimination laws would be accorded "strict" rather than "absolute" scrutiny.[30] But it is hard to see what difference this makes, since the strict scrutiny standard is almost always fatal to the law being scrutinized.[31]

Three intriguing state cases in this area concern laws that discriminate between men and women who uncover their chests in public. The Hawaii courts upheld a law requiring female prison visitors, but not males, to wear brassieres.[32] A Washington law prohibiting the public display of women's breasts but not of men's chests was also upheld.[33] But another Washington law prohibiting "topless" dancing was construed to forbid topless dancing by men as well as by women, in order to avoid possible constitutional problems.[34]

The most important question having to do with "unique physical characteristics" and "separate but equal" treatment, however, is whether courts would apply the Loving v. Virginia[35] analysis to sex discrimination if the ERA were ratified. In Loving the United States Supreme Court held unconstitutional a state law forbidding intermarriage between whites and blacks. The state argued that it punished blacks and whites equally for violations of the statutory crime. But the Court reasoned that the law prohibited a black person from doing something --- marrying a white person --- that it permitted a white person to do. This was enough to make the law unconstitutional, notwithstanding the alleged symmetrical discrimination against white people who wanted to marry black people. The Court held in essence that not even two symmetrical constitutional wrongs can make a right.

In Singer v. Hara[36] the Washington Supreme Court refused to apply the Loving analysis to a law that provided only for heterosexual marriage. The court reasoned that men and women are being treated equally so long as the marriage of a man to a man is prohibited equally with the marriage of a woman to a woman. But this begs the question, since in any particular case in which John wants to marry Jim and is legally prohibited from doing so, he is being treated differently from Mary, whom the law allows to marry Jim. This is exactly the reasoning that Loving applied to race. Many people believe, of course, that sex is different from race. The question is whether the Equal Rights Amendment would allow courts to go on believing this. Singer v. Hara suggests the affirmative.

In Laspino v. Rizzo,[37] however, the Pennsylvania Supreme Court struck down a law that prohibited women from massaging men in massage parlors and vice versa. The court held that Loving did apply to sex discrimination: a women who wanted to massage men was treated differently from a man who wanted to massage men, and the argument that "unique physical characteristics" justified this discrimination was rejected. Laspino suggests that the Loving analysis might be applied to strike down laws limiting marriages to heterosexuals. *Loving* itself concerned marriage rather than massage parlors. A person who is denied the right to marry the partner of his choice suffers a far greater injury than someone who is denied only the right to massage people for money. This injury includes not only social stigma, which figured in the court's rejection of "separate but equal" race discrimination, but also economic injuries such as the loss of tax advantages. *Laspino* and *Singer* suggest that the constitutionality of laws prohibiting homosexual marriage would be an open question under the Equal Rights Amendment.

V. Economic Discrimination.

The final question is whether the Equal Rights Amendment would prohibit any economic discrimination that is not currently prohibited under the judicial interpretation of the fourteenth amendment. There are no state cases suggesting that it will. I am aware of hardly any state equal rights amendment cases involving economic discrimination against women.[38] In these cases the same result would almost certainly have been reached under the fourteenth amendment, which has been construed to prohibit sex discrimination by state and local governments.[39] Neither the federal nor most of the state equal rights amendments are supposed to reach private discrimination.[40] It is therefore difficult to see what impact the federal ERA would have on the relative economic situations of men and women, and the state cases do not suggest that state equal rights amendments have had any such impact.

V. Conclusion.

The state cases do not prove anything. They do, however, suggest that not all of the opponents' fears are chimeras to be dismissed under the general head of coed restroom mongering. The question the Subcommittee should ask, in my view, is whether the probability of palpable benefits exceeds the probability that some harm will result. Even the substantial possibility that the amendment will be interpreted to require abortion funding, the elimination of all-girls' athletic teams, and the denial of tax exemptions to private mens' and womens' colleges would seem to require proponents to present a strong showing of the likelihood that the amendment will produce palpable and important benefits. Assuming such a showing can be made, the ideal solution is to amend the proposal so as to secure its desirable results while reducing the risk of undesirable ones.

FOOTNOTES

1. *See* Colo. Const. art. II sec. 29; Hawaii Const. art. I sec. 21; Md. Const., Declaration of Rights art. 46; N.H. Const. art. 2d pt. 1st; N.M. Const. art. II sec. 18; Pa. Const. art. I sec. 28. *See also* Wash. Const. art. XXXI sec. 1 ("equality of rights and responsibilities").

2. *See* Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974); Commonwealth v. Pennsylvania Interscholastic Athletic Assoc., 18 Pa. Commw. 45, 334 A.2d 839 (1974); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

3. *See* Seattle v. Buchanan, 584 P.2d 918 (wash. 1978); Singer v. Hara, 522 P.2d 1187 (Wash. 1974).

4. *Cf.* Seattle v. Buchanan, 584 P. 2d 918 (Wash. 1978), where the Washington Supreme Court, in upholding a statute that prohibited public exposure of female but not male breasts, said that to decide the case otherwise "would lend validity to objections voiced by opponents of the amendment, and weaken public confidence in its beneficence."

5. *See* Comment, *Equal Rights Provisions: The Experience Under State Constitutions*, 65 Calif. L. Rev. 1086, 110 & n.124, and sources cited therein.

6. *See* Nan Duskin, Inc., v. Parks, *Legal Intelligencer*, Mar. 15, 1978, at 1 Col. 1 (Phila. County C.P. 1975); Coleman v. maryland, 32 Md. App. 322, 377 A.2d 553 (1977).

7. Wiegand v. Wiegand, 226 Pa. Super. Ct. 278, 310 A.2d 426 (1973), *rev'd*, 461 Pa. 483, 337 A.2d 256 (1975) (reversed on the ground that the court had raised the constitutional issue sua sponte).

8. Commonwealth ex rel. Spriggs v. Carson, 470 Pa. 270, 368 A.2d 635 (1977); Murray v. Murray, 28 Wash. App. 187, 622 P.2d 1288 (1981); McAndrew v. McAndrew, 39 Md. App. 413 , A.2d ( ); Elmore v. Elmore, (Ill. App. 1974).

9. Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); Smith v. Smith, 13 Wash. App. 381, 534 P.2d 1033 (1975); Rand v. Rand, 379 A.2d 900 (1977).

10. Bell v. Bell, 379 A.2d 553 (Md. 1977); Butler v. Butler, 464 Pa. 522, 347 A.2d 477 (1975).

11. *See* Cox v. Cox, 532 P.2d 944 (Utah 1975); State v. Barton, 315 So. 2d 289 (La. 1975); Broussard v. Broussard, 320 So. 2d 236 (La. App. 1975); Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973); Mercer v. North Forest Ind. School Dist., 538 S.W.2d 201 (Tex. Civ. App. 1976).

12. *See* In re Estate of Kujath, 345 P.2d 662 (Mont. 1976).

13. *See*, *e.g.*, Franks v. Franks, 189 Colo. 499, 542 P.2d 845 (1975).

14. *See* Brooks v. State, 24 Md. App. 334, 330 A.2d 670 (1975) (rape); State v. Rivera, 612 P.2d 526 (Hawaii 1980) (rape); People v. Gould, 532 P.2d ___ (Colo. 1975) (rape); Commonwealth v. Finnegan, 280 Pa. Super. 584, 421 A.2d 1086 (1980) (prostitution).

15. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

16. Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975); Commonwealth v. Pennsylvania Interscholastic Athletic Assoc., 18 Pa. Commw. 45, 334 A.2d 839 (1974); Attorney General v. Massachusetts Interscholastic Athletic Assoc., 378 Mass. 342, 393 N.E.2d 284 (1979).

17. Petrie v. Illinois High School Assoc., 75 Ill. App. 3d 980, 394 N.E.2d 855 (1979).

18. See sources cited in note 16, *supra*.

19. *But see* Attorney General v. Massachusetts Interscholastic Athletic Assocl, 393 N.E.2d at 295: "We do not overlook the difficulties in maintaining fair competition when mixed teams enter the lists, but it would be premature to assume that the difficulties are insurmountable. That assumption might itself stem from stereotypes which ERA rejects."

20. *See* Newberg v. Board of Public Education, 478 A.2d 1352 (Pa. Super. Ct. 1984), denying the right to intervene in order to appeal the district court's judgment that separate boys' and girls' public high schools violated state Equal Rights Amendment).

21. *See* Comment, Plessy Revived: The Separate but Equal Doctrine and Sex-Segregated Education, 12 Harvard C.R.-C.L.L. Rev. 585 (1977).

22. Bainum v. Maryland (unreported district court decision, 1984).

23. Bob Jones University v. United States, 103 S. Ct. 2017 (1983).

24. Marchioro v. Chaney, 528 P.2d 1148 (Wash. 1977).

25. *See* Harris v. McRae, 448 U.S. , (1980) (law funding some operations but not abortions did not violate the equal protection clause, since it was not "legislation that purposefully operates to the detriment of a suspect class"); Oliphant, *ERA and the Abortion Connection*, 7 Human Life Review 42, 48:

> If the Equal Rights Amendment had been in the Constitution when *McRae* was decided, the result surely would have been *opposite.* ERA is designed to make the class of women (and the class of men) a suspect class.

26. *See* Moe v. King, 382 Mass. 629, 417 N.E.2d 387 (1981); Hawaii *Right*-to-Life v. Chang (unpublished decision of the Circuit Court of the First Circuit, State of Hawaii, Civil No. 53567) (1978).

27. Doe v. Maher (unreported memorandum of decision on motion for preliminary injunction, Superior Court, Oct. 8, 1981) (Although it was unnecessary to construe the state ERA, the argument that it should be construed to require abortion funding was "tempting and very persuasive.").

28. Fischer v. Commonwealth Department of Public Welfare (unreported opinion of Commowealth Court Judge MacPhail) (appeal pending to full Commowealth Court).

29. *Compare*, *e.g.*, Alexander & Fiedler, "The Equal Righ-s Amendment: Separate and Distinct," *America* 314 (April 12, 1980) (pregnancy is a physical characteristic unique to women, so that legal distinctions based on pregnancy would be permissible under the ERA) *with* Brief for Women's Law Project and American Civil Liberties Union as amici curiae at 4-5, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (pregnancy classifications are not "outside the scope of the ERA," and discriminatory "treatment of disabilities related to pregnancy and childbirth would not survive the scrutiny under the amendment," although such scrutiny would be "strict" rather than "absolute").

30. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871 (1971).

31. *See* Gunther, *Foreword---In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

32. Holdman v. Olim, 581 P.2d 1164 (Hawaii 1974).

33. Seattle v. Buchanan, 584 P.2d 918 (Wash. 1978).

34. Bolser v. Washington State Liquor Control Board, 580 P.2d 629 (1978).

35. 388 U.S. 1 (1967).

36. Singer v. Hara, 522 P.2d 1187 (Wash. 1974).

37. Laspino v. Rizzo, *Legal Intelligencer*, Dec. 2, 1977, at 1, col. 2 (Phila. County Ct. C.P. 1977), *rev'd on other grounds*, 398 A.2d 1069 (Pa. Commw. Ct. 1979).

38. *See*, *e.g.*, Gilman v. Unemployment Compensation Board, 28 Pa. Commw. 630, 369 A.2d 895 (1977) (invalidating school district requirements applying only to pregnant women employees).

39. Although distinctions between men and women may be survive fourteenth amendment scrutiny if they operate "benignly" to remedy past economic discrimination against women, even such "benign" classifications will be struck down if they operate in fact to disfavor women. *See* Califano v. Goldfarb, 430 U.S. 199 (1977). *Cf.* Sylvara v. Industrial Comm'n, 550 P.2d 869 (Colo. 1976) (challenge under state ERA to rule denying unemployment benefits to pregnant women; held violative of fourteenth amendment, so that construction of ERA was unnecessary). *Cf. generally* Comment, *supra* note 5, at 1107 (footnotes omitted):

> [T]hose statutes and practices which have hindered women't employment and educational progress to a large extent fall under the Federal Civil Rights Acts. . . . Thus we find many [state ERA] cases involving ex-husbands trying to avoid paying alimony or attorney's fees or involving fathers seeking custody of their children, but few cases involving women denied equal employment opportunities or other job-related benefits.

40. *See* Brown et al., *supra* note 30; Darrin v. Gould, 85 Wash. 859, 540 P.2d 882 (1975) (requirement of equality "under the law" forbids only discrimination attributable to state action).

RESPONSES OF GROVER REES III TO WRITTEN QUESTIONS
OF SENATOR HATCH

AREN'T CONSTITUTIONAL AMENDMENTS SUPPOSED TO BE GENERAL STATEMENTS OF PRINCIPLE? WHY SHOULD WE PLACE A BURDEN UPON THE PROPONENTS OF THE AMENDMENT TO PLACE IN THE AMENDMENT SPECIFIC LANGUAGE DEALING WITH EVERY POSSIBLE CONTINGENCY? AREN'T THERE RELEVANT DIFFERENCES BETWEEN A CONSTITUTIONAL AMENDMENT AND A SIMPLE STATUTORY MEASURE?

It depends what one means by a "general statement of principle." The central premise of Marbury v. Madison was that the Constitution is law, binding the judiciary as well as the other branches of government. According to Marbury, a judge declares a statute unconstitutional not when he believes it to be bad, but when the Constitution requires him to do so. If constitutional provisions don't really bind judges, but merely give them power to substitute their own policy preferences for those of elected legislatures whenever such preferences can be reconciled with any semantically plausible construction of any phrase in the Constitution, then judicial review needs a quite different justification than the one advanced in Marbury. It needs, in fact, the same justification that unreviewable lawmaking by any other unrepresentative nine-member junta would need. I don't know of any persuasive justification for this kind of lawmaking. So I believe constitutional provisions should be "specific" enough to bind judges as well as the rest of us.

IF WE PLACED THE KIND OF RESPONSIBILITY UPON DRAFTERS OF THE FOURTEENTH AMENDMENT WHICH YOU BELIEVE OUGHT TO BE PLACED UPON THE DRAFTERS OF THE EQUAL RIGHTS AMENDMENT, WOULD WE HAVE EVER HAD A FOURTEENTH AMENDMENT? AREN'T WE ATTEMPTING TO IMPOSE AN UNREASONABLE BURDEN OF SPECIFICITY UPON THE DRAFTERS OF THIS AMENDMENT?

In my view, the courts have done a number of good things and a number of bad things in the name of the fourteenth amendment. The opacity of some of the language in the amendment is hardly its strong point. If we had suggested to the framers of the fourteenth amendment that the courts would construe it to create a constitutional right to abortion, the abolition of Bible reading in the public schools, and coercive busing of school children to achieve racial balance, I believe they would have attempted to make it clear that the amendment was not intended to do any of these things --- or to give courts the power to do them. If the fourteenth amendment had been "specific" enough to foreclose some of the more creative judicial applications of it, I believe that we would be better off today, not only because a number of specific controversies might have been resolved more to my own satisfaction but also because it seems likely that excessive judicial government reduces the capacity for responsible self-government.

IS IT YOUR VIEW THAT THE PROPONENTS OF THIS AMENDMENT HAVE THE BURDEN OR OBLIGATION TO SPECIFY IN THE TEXT OF THE AMENDMENT THEIR PERSPECTIVES ON HOW THE ERA WOULD DEAL WITH EVERY CONCEIVABLE ISSUE RELATING TO ITS APPLICATION?

No, but when a plausible case exists prior to proposal of an amendment that it will do things that almost nobody would like it to do --- not just in a few discrete and arcane hypotheticals, but in whole broad categories of cases --- and when this possibility can be effectively foreclosed by adding a few words to the current draft of the amendment, it is incumbent upon the proponents to come forward with a good reason for failing to include such limiting language. As far as I am aware, the only argument against the "Sensenbrenner amendment" to the ERA, which would have made it clear that the amendment was to have nothing to do with abortion one way or the other, was that the proponents were aesthetically attached to the 1972 language. That's not a very good reason, and one cannot help thinking that many ERA proponents opposed the limitation because they hope and expect that the ERA would indeed contribute to the further development of abortion rights.

"Legislative history" does not work nearly as well in limiting judicial interpretations as it ought to do. Judge Wald of the D.C. Circuit has compared the judicial use of legislative history to "looking out over a crowd and picking out your friends." One cannot, however, insert every desirable limitation into the text of an amendment. Obviously, in each case one's judgment about whether to insert limiting language rather than to resort to legislative history depends on one's estimate of the likelihood that the courts will be attracted to a certain interpretation of the provision and of the importance of foreclosing such an interpretation.

WHAT IS WRONG WITH A CONSTITUTIONAL AMENDMENT SERVING NOTHING MORE THAN A SYMBOLIC FUNCTION?

Nothing. But if the symbolic function is the *only* desirable effect that seems likely, and if it seems quite possible that the amendment will have a number of quite palpable undesirable effects, then I would prefer to do without both.

ISN'T IT TRUE THAT CLASSIFICATIONS ON THE BASIS OF SEX WERE NOT EVEN SUBJECT TO 'EQUAL PROTECTION' ANALYSIS UNTIL THE COURT'S DECISION IN *REED v. REED* IN 1971?

All classifications were subject to equal protection analysis, but classifications based on sex were generally upheld by the courts on the ground that they were rationally related to a legitimate state objective. Indeed, the fact that fourteenth amendment prohibitions of sex classifications seem to have been created by the Court rather than by those who framed and ratified the amendment is an excellent argument for an Equal Rights Amendment that is carefully crafted to provide the sort of protection the Court has been reading into the fourteenth amendment without risking the undesirable effects the ERA might have if ratified with its current language and its current legislative history.

Senator HATCH. Professor Kristol.

STATEMENT OF PROF. WILLIAM KRISTOL

Professor KRISTOL. Thank you. I am honored to have been asked to contribute to this committee's consideration of the proposed equal rights amendment. The Nation owes this committee a debt of gratitude for its sustained inquiry into the meaning and implications of the ERA over the last year and a half, an inquiry that seems to me to be a model of the serious and responsible examination of a constitutional issue. This examination has brought with it the additional benefit of illuminating, to a remarkable degree, many of the important features of our present constitutional landscape. Thus, the work of this committee has contributed both to our ability to make an informed judgment on the ERA, and to our understanding of the Constitution, and the constitutional interpretations, that we live under today.

With so considerable an intellectual record already in place, my testimony today will be straightforward in character and limited in scope. In the course of their discussions of the impact of the ERA on particular areas of public policy, several commentators have noted that the ERA would have a substantial impact on the scope and distribution of governmental power. It is this aspect of the ERA that I intend to focus on today. For the consequences of the ERA on our constitutional order could well be as significant as its consequences in any substantive policy area.

It is clear that adoption of the ERA would lead to a significant transfer of governmental authority—first, from the legislative branch of the Federal Government to the judiciary; second, from the States and localities to the Federal Government; and third, from individuals and groups in the private sphere to the State. I shall try to suggest why these shifts in authority ought not to be welcomed, and I shall conclude with a comment on the symbolic importance of the ERA.

That adoption of the ERA would represent a grant of immense authority to the Federal judiciary seems to me incontrovertible. The chief sponsor of the amendment in the Senate said as much when he appeared before this committee in the first of this series of hearings.[1] Because the sponsors of the ERA have been resolutely unwilling to clarify the language of the amendment, what the amendment means—whether it is to be interpreted as absolute or in the light of common sense or somewhere in between—what the amendment means is left to the determination of the courts. Those proponents of the ERA who, in an attempt to mollify critics, claim to accept some sort of commonsensical interpretation of the amendment, indict themselves all the more of what George Will has called a complacent abdication of responsibility by legislators,[2] insofar as they continue to refuse to incorporate any language specifying just what the commonsense interpretation is. The more absolutist proponents of the ERA might at least seem innocent of this charge, since they say that they intend for the amendment to mean what it says. Yet, as Jules Gerard has pointed out,[3] even the absolutists have recourse to a unique physical characteristics qualification, a qualification that simply leads them into a more sophisticated form of judicial question begging.

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[1] See the exchange between Senator Hatch and Senator Tsongas in the hearings on the Equal Rights Amendment before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, May 26, 1983.

[2] George F. Will, "Praise the ERA and Pass the Buck," the Washington Post, June 2, 1983.

Thus Walter Berns is absolutely correct to say that the ERA should be labeled a judiciary act, inviting the courts to decide the particular issues that Members of Congress would appear eager to avoid.[4] But this is more than a usual instance of Congress abdicating the responsibility to make hard choices to the courts. For, as Berns reminds us,[5] what is at issue here is not a statute but a constitutional amendment. And the Constitution, of course, derives not from the legislature but from the people acting in their sovereign capacity. In proposing an amendment such as this to the people, Congress does more than act irresponsibly on its own. It invites the American people to resign their responsibility to govern themselves in this entire sphere of relations between the sexes, into the hands of the Federal judiciary.

Now one could object that every constitutional provision and every judicial decision enforcing one of those provisions limits the people's right to self-government; how is this case different? But surely the difference is obvious. A judiciary that upholds constitutional provisions and protects individual rights is a glory of the American tradition. But that is a far cry from inviting the judiciary, through a constitutional amendment, to shape or reshape society under the guise of securing rights. It might also be objected that in recent years Congress and the American people have allowed the judiciary to play a more active role in shaping society. But an unfortunate habit of popular and especially congressional acquiescence in Government by judiciary is no justification for Congress now to encourage the people to engage in a wholesale abdication of the responsibility of self-government.

In addition to shifting authority to the Federal judiciary in particular, the ERA would shift governmental authority from the States and localities to the Federal Government as a whole. Some States now have an ERA; others do not. Some localities have sought to prevent even private clubs from discrimination on the grounds of sex; others have not. And a host of provisions of family law, and many laws relating to morals differ from State to State and from locality to locality. All of this would become subject to nationalization under section 2 of the ERA; much of it would be immediately constitutionalized by the courts acting under the amendment.

Yet nowhere is the case for federalism—and for localism—stronger than with regard to policies pertaining to family and morality. One of the great virtues of federalism is that it permits a reasonable reconciliation of the twin principles on which this republic rests, the principles of self-government and of individual rights.

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[3] Testimony on the Equal Rights Amendment before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, May 26, 1983, pp. 13-17.

[4] Testimony on the Equal Rights Amendment before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, May 26, 1982, p. 7.

[5] Ibid., p. 4.

Self-government implies the right, at least up to a point, to create a community of a certain character—a character manifested in choices ranging from whether to permit the sale of liquor or not to what sort of curriculum to have in the public schools. Obviously such choices, if pushed too far, could run up against the principle of individual rights. But the practice of federalism, and of local control, allows for a more comfortable reconciliation of the principle of citizen self-government with the principle of individual rights than would a single national standard. A variety of community policies with regard to pornography, or State policies with regard to divorce or prostitution, allows citizens to shape their communities without precluding other judgments elsewhere. The movement toward nationalizing such issues would insure bitter national political battles, in which the claim of self-government would run up directly against that of individual rights, without the softening of the clash made possible by federalism and local differentiation. Whether the disputes would be resolved in the direction of one pole or the other—whether, for example, in the name of individual rights the courts would legalize homosexual behavior throughout the Nation; or whether, for example, in the name of enforcement of the ERA Congress would pass a national nonsexist education code—the ERA would have damaged what remains an important and worthwhile feature of our constitutional order.

The ERA would shift authority not just from the States and localities to the Federal Government, but from the private sphere to the Federal Government. It is true that, on its face, the ERA purports to apply only to actions by the United States or any State. But the fact that section 1 of the 14th amendment appears to apply only to State action has not prevented an obscuring, by courts and by Congress acting under its aegis, of the distinction between public and private.

The increasing erosion of any notion of a private sphere free of Government shaping has been particularly evident in areas touched by the suspect classification of race. If adoption of the ERA were to bring the standards for judging sex classifications up to those for race, as I believe it would, then it is not difficult to anticipate that the private choice of single-sex education or even certain patterns of religious practice could be subject to governmental intervention. It is easy to predict that such organizations would be forced to disengage themselves of any public connection whatsoever—and the notion of public connection could be so broadly defined that staying clear of it could become virtually impossible.[6]

Why would this be so bad, one might ask. Why not pursue the goals of justice and of equal rights everywhere, including in the private sphere? Because a free society, and constitutional government, stand or fall by the understanding that there is a sphere beyond Government control in which discrimination is tolerated. Now, in the case of racial discrimination, one can make an argument that extraordinary Government intervention was required because of the peculiar history of race relations in America which had led to an entrenched social situation that was terribly unjust, dangerous, and not otherwise likely to change. But even in this area most would admit that at some point the governmental intervention can become too intrusive and counterproductive; and almost everyone looks forward to the day—some think it has arrived or is near, others that it is far off—but almost everyone looks forward to the day when that intervention will recede because it is no longer necessary. But massive Government intervention on behalf of sexual equality lacks the decisive justification it could claim in the case of race. Women are far from a discrete and insular minority, and women's status had been changing for a long time before congresssional and judicial intervention. Furthermore, such intervention on behalf of sexual equality would be more intrusive and pervasive than in the case of race, since it would always have to be trying to negate the natural fact that the sexes are fundamentally distinct and different in a way the races are not. In the long run, such Government intervention would erode the fundamental premises of limited constitutional Government and could well be dangerous to social peace and individual liberty.

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[6] See the testimony of Jeremy A. Rabkin on the Equal Rights Amendment before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, Sept. 13, 1983.

None of the arguments presented here—or those offered in other testimony about the effects of the ERA—will persuade those who yearn for the imposition, in Philip Kurland's words, of "unisex by national mandate." [7] But there are large numbers of citizens who are not enthusiasts of such a vision, and who are in fact concerned by some of the likely effects of the ERA. Many of these citizens nonetheless incline either toward the adoption of the ERA with the hope of reasonable judicial interpretation or toward the adoption of a modified ERA. As Catherine Zuckert has explained before this committee, there is concern that the simple defeat of the ERA would be a symbolic setback for the principle of equal rights for women, perhaps even "producing a real" setback as well." [8] What of this concern?

The ERA is clearly a symbol of different things to different people. But I do not think it fundamentally stands as a symbol of the "public recognition of the equal rights and status of women in the United States." [9] If, on the one hand, our laws and customs had not changed to the degree they have without the ERA and if, on the other hand, the proponents of the ERA had entertained moderating and clarifying revisions early on, then the case might be different. But the changes have happened without the ERA and the ERA proponents have always rejected provisions. They have done so precisely because, as Zuckert says, a modified amendment "would not affect the social revolution some of the more extreme advocates of 'women's liberation' hoped for * * *" [10]

Because of its proponents, the ERA has become a symbol not of equal opportunity for women, but of social revolution imposed from above. This is suggested by the fact that in all of the State referenda that have been held on State or Federal ERA's, the ERA has been defeated.[11] The majority of voters in Wisconsin, New York, New Jersey, Nevada, Iowa and Florida were not voting against equal opportunity for women; nor did they think passage of the ERA necessary symbolically to vindicate that principle. They opposed the ERA because they saw it as a surreptitious attempt to help usher in a revolution in society and a transformation in our constitutional order.

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[7] Testimony before subcommittee No. 4 of the Committee on the Judiciary, U.S. House of Representatives, 1971, p. 582.

[8] Testimony of Catherine H. Zuckert on the Equal Rights Amendment before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, Aug. 7, 1984, p. 14.

[9] Ibid.

[10] Ibid.

I conclude, therefore, that a consideration of the symbolic effects of defeating the ERA reenforces the substantive argument for its defeat. Thanks to its proponents, the ERA has come to symbolize contempt for our constitutional and social traditions—for the way we have lived and for the way we have governed ourselves that has permitted such a way of life. Defeat of the ERA should thus be seen as a symbolic reassertion of our constitutional principles of self-government, federalism and freedom within a private sphere. This reassertion should bring with it a deepening of our understanding of those principles, and a determination to address ourselves to our current legislative practices and constitutional interpretations so as to bring them more into line with those principles.

Senator HATCH. I want to thank both of you for your excellent statements. Let me just ask one question, and then I would like to submit written questions to you and give you time to answer those.

Should a constitutional amendment be expected to deal with the various details of its application in the same manner as a statute? What is the appropriate standard here?

Professor REES. Well, it is certainly an argument against detail in a constitutional amendment that on the one hand, we do not want to clutter up the Constitution with needless detail, and on the other hand, if you need a whole lot of detail in an amendment, then maybe it should not be part of the Constitution. Maybe it should be a statute.

On the other hand, what has happened in the case of the equal rights amendment is that specific questions have been raised. These questions are not frivolous ones. They have been generated by the uncertainty among the proponents themselves about which of a number of competing concepts of equality they endorse.

There have been specific questions about abortion in particular, specific questions about a number of other issues. Given, as you know, Senator, the difficulty of controlling judicial interpretation of language by legislative history—in the famous example of the *Weber* case and other cases, the court has simply explained away one part of the legislative history by reference to other parts of the legislative history or by simply taking the whole issue to a broader level of generality than is spoken to by a particular piece of legislative history—it seems to me that the equal rights amendment, without clarifying language, without some kind of limitation, would amount, as Professor Kristol has said, to a charter to the courts to go out and legislate in the general area of equality between the sexes.

Senator Tsongas and others have endorsed this as the sort of thing that a constitution ought to do, and they have referred back to the 14th amendment, and said, "After all, that is what the 14th amendment did. Do you want to repeal the 14th amendment?"

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[11] See Orrin G. Hatch, "The Equal Rights Amendment: Myths and Realities" (Savant Press: 1983), p. 95.

Well, with all deference, if you would have asked the framers of the 14th amendment whether what they had in mind was a general mandate to the courts to go out and legislate in the area of due process, equal protection and privileges and immunities, they would have said no.

Senator HATCH. They would have been horrified.

Professor REES. That is right. They were rather down on courts at the time as historians will attest.

The question, therefore, is whether we can get what is good out of the sort of thing that the 14th amendment was without what is bad. If we had the 14th amendment to do over again and we could get equal rights between the races, if we could get procedural safeguards in criminal trials without getting *Roe* v. *Wade*, without getting busing, without getting racial quotas, would we do it?

For me the answer is "Yes." If I had been around at the time of the 14th amendment and legitimate questions had been raised, if somebody had said,

> They are going to use this to create a right to abortion and they are going to use this to create racial balance bussing. They are going to use this to create racial quotas. Should we enact an amendment to preclude those things?

It seems to me the answer would clearly have been "Yes."

Senator HATCH. Professor Kristol.

Professor KRISTOL. For proponents of the ERA to complain when others raise questions about what the actual implications of this impossibly vague amendment are is like the child who kills his parents and then pleads for mercy because he is an orphan.

They did not have to insist on such a vague amendment. Indeed, they were invited quite early on in these considerations both in the early 1970's and again, I think, last year to suggest clarifications and revisions, and the proponents of the ERA have always refused to do that.

They want it to be a blank check for the Federal courts and to a degree for Congress, and they cannot very well complain, then, when others point out some of the things that might be filled in on that check.

It is also not true that all constitutional amendments are always general in the way the ERA is. The proposed amendment to return the abortion decision to the States is not vague. The balanced budget amendment is not vague in the same way.

If you look at most of the amendments in the Constitution they are actually quite specific. Eighteen-year-olds shall have the right to vote, things like that. So the reason the amendment is vague is because the proponents of the ERA want it to be vague.

Senator HATCH. I would like to thank both of you. I have a variety of additional questions for you to answer that I will send to you.

I would like to get your answers back as soon as possible. Again, I would like to thank both of our witnesses for coming today.

I would request that the record be closed to written testimony and amendments 1 week from today.

With that, we will recess until further notice.

[Whereupon, at 10:57 a.m., the subcommittee recessed at the call of the Chair.]

[The following was received for the record:]

MISCELLANEOUS MATERIAL

[From the New York Times, June 22, 1984]

SIXTEEN STATE E.R.A.'S: A BOON TO WOMEN AND MEN

To the EDITOR:

I was truly surprised by the statement in your June 21 news article about the New York State equal rights amendment, attributed to E.R.A. supporters, that "16 states had adopted equal rights amendments with little harmful effects."

Based on my intensive study of state E.R.A.'s over the past five years, I feel confident in stating that there have been no harmful effects. Indeed, the impact of these amendments has been highly beneficial in achieving equity for women and men.

Throughout the country, court decisions and legislative enactments stemming from state E.R.A.'s have resulted in a significant extension of the legal rights of both women and men in the areas of employment, education and family law.

For example Connecticut and Illinois repealed laws restricting employment opportunities for women. Maryland, Virginia and Washington eliminated discriminatory gender lines from workers' compensation benefits and unemployment benefits.

In Massachusetts, female law students won the right to apply for a scholarship previously awarded only to male students; Pennsylvania females recently won the right to enter Central High School, a prestigious public school previously open only to males, and the New Mexico Attorney General ruled that girls could not be excluded from a special high school program in a state-operated school.

In the area of family law, there has been a growing recognition in E.R.A. states of marriage as an economic partnership, with mutual family responsibility and mutual acquisition of assets. This recognition has brought with it a much-needed confirmation of a married women's economic rights in the marital partnership and contribution to it through her work as a homemaker and mother, thus strengthening the legal position of women in marriage.

The Pennsylvania courts and Virginia's Legislature voided the common-law rule which presumed that all household goods acquired during a marriage are owned by the husband, the Pennsylvania court observing that the old rule failed to acknowledge the "equally important and often substantial non-monetary contributions" made by the homemaker spouse.

A Pennsylvania court rule that after divorce a custodial parent who devotes full time to child rearing is not required by the E.R.A. to obtain employment in the paid labor force to support her (or his) child. Courts in Colorado and Texas have also recognized the value of non-monetary contributions provided by a homemaker/mother.

The partnership concept of marriage has been recognized with respect to non-economic issues as well. Courts in Alaska, Pennsylvania, Texas and Washington relied on their state E.R.A.'s to grant women the right to sue for loss of their husband's consortium, a right denied them under common law, the Pennsylvania Supreme Court stated: "Today a husband and wife are equal partners in a marital relationship, and, as such, should be treated equally under the law with respect to that relationship."

In addition to obtaining new substantive rights that have led to expansion of opportunities for women and men, there has been a tremendous psychological lift derived from the constitutional declaration of equality, the impact of which cannot be underestimated.

The recognition that women and men should be treated as equal is an idea whose time is long since due. State E.R.A.'s prove that the Equal Rights Amendment is an effective and desirable means of reaching this goal. Let's stop posturing and move on to the real issue of assuring equality for all our citizens.

JUDITH I. AVNER.

(From Policy Review, Summer 1979)

THE EFFECT OF EQUAL RIGHTS AMENDMENTS IN STATE CONSTITUTIONS

(By Phyllis Schlafly)

In the span of years during which the proposed Equal Rights Amendment[1] to the United States Constitution has received active consideration by the Congress and the various state legislatures, that is, during the decade of the 1970s, several states have amended their state constitutions by provisions which have become popularly known as State Equal Rights Amendments (ERAs).[2] Since these State ERAs are sometimes believed to be state enforcement of what the Federal ERA, if ever ratified, would require on a nationwide basis, and are believed, therefore, to forecast the eventual effect of a Federal ERA, it is important to analyze their language and the effect they have had in the various states that have enacted them.

The term "Equal Rights Amendment" refers to the proposed federal and state constitutional amendments which mandate equality on account of sex. It does not refer to any other type of equality. It has no reference to equality on account of race, color, creed, age, income level, or any other characteristic.

Since it is self-evident that legislatures have the power to pass sex-equal laws and to repeal sex-discriminatory laws independent of any ERA, this discussion will be generally limited to an analysis of the amendments themselves and of the changes in state laws which have been compelled by the State ERAs through court decisions. Also, in order to be accurately attributable to a State ERA, such changes must be beyond those which would have been required had the case been brought under the already-existing Equal Protection Clause of the Fourteenth Amendment, which has been used repeatedly by the U.S. Supreme Court and other courts to invalidate many sex-discriminatory federal and state laws.[3]

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[1] H. R. J. Res. 208, 92d Cong., 1st Sess. (1971). For proponent discussion of the proposed Federal ERA, see Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L. J. 871 (1971). For other sources, see H. Greenberg, *The Equal Rights Amendment: A Bibliographic Study* (1976); M. Hughes, *The Sexual Barrier: Legal, Medical, Economic and Social Aspects of Sex Discrimination* (1977).

[2] For proponent discussion of State ERAs, see B. Brown, A. Freedman, H. Katz, & A. Price, *Women's Rights and the Law: The Impact of the ERA on State Laws* 19-36 (1977).

At the outset, several fundamental differences between the State ERAs and the proposed Federal ERA should be noted.

(a) No State ERA governs federal law. Therefore, many of the principal effects anticipated under the proposed Federal ERA would never result from any State ERA (for instance, the application of the full-equality principle to the military, including conscription and combat assignment). The House Judiciary Committee stated in its majority report on the Federal ERA, "For example, not only would women, including mothers, be subject to the draft but the military would be compelled to place them in combat units alongside of men."[4]

(b) State constitutions are interpreted principally by state courts. The proposed Federal ERA would, if ratified, be interpreted principally by the federal courts, which include some of the most activist courts in the country. While state courts would be bound to follow the U.S. Supreme Court interpretation of the Federal ERA, federal courts would not be bound to interpret the Federal ERA to produce the same result as any state court's interpretation of its State ERA. The proposed Federal ERA would give the federal courts a blank check to fill in after ratification. Thus, as Professor Paul Freund stated, "If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States."[5]

(c) The legislative histories of the Federal and the State ERAs are different. The proposed Federal ERA has an extensive and well-recorded legislative history, including lengthy congressional debate in both houses and many roll-call votes on proposed modifications in language which establish a clear pattern of legislative intent for the guidance of the courts. In the U.S. Senate, Senator Sam J. Ervin, Jr., offered nine amendments variously exempting from the absolute-equality mandate compulsory military service; combat duty; the traditional rights of wives, mothers, widows and working women; privacy; punishment for sexual crimes; and distinctions made on physiological or functional differences. All amendments were defeated on roll-call votes, forcing the legal conclusion that the Federal ERA is designed to accomplish precisely what Senator Ervin and his supporters sought to exempt.[6] In contrast, the legislative history of State ERAs is sparse or non-existent. Most state legislatures do not print

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[3] *See, e.g., Reed v. Reed*, 404 U.S. 71 (1971) (nullifying preference to men over women of the same entitlement class as administrators of decedents' estates).

[4] House Comm. on the Judiciary, Equal Rights for Men and Women, H. R. Rep. No. 359, 92d Cong., 1st Sess., 3 (1971).

[5] Senate Comm. on the Judiciary, Equal Rights for Men and Women, S. Rep. No. 689, 92d Cong., 2d Sess., 34 (1972).

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[6] Amendment 1065: "This article shall not impair, however, the validity of any laws of the United States or any State which exempt women from compulsory military service." Defeated: 73 nays, 18 yeas, 8 not voting. 118 Cong. Rec. 9336 (1972).

Amendment 1066: "This article shall not impair the validity, however, of any laws of the United States or any State which exempt women from service in combat units of the Armed Forces." Defeated: 71 nays, 18 yeas, 10 not voting. 118 Cong. Rec. 9351 (1972).

Amendment 1067: "This article shall not impair the validity, however, of any laws of the United States or any State which extend protections or exemptions to women." Defeated:75 nays, 11 yeas, 14 not voting. 118 Cong. Rec. 9370 (1972).

Amendment 1068: "This article shall not impair the validity, however, of any laws of the United States or any State which extend protections or exemptions to wives, mothers, or widows." Defeated: 77 nays, 14 yeas, 9 not voting. 118 Cong. Rec. 9523 (1972).

Amendment 1069: "This article shall not impair the validity, however, of any laws of the United States or any State which impose upon fathers responsibility for the support of their children." Defeated: 72 nays, 17 yeas, 11 not voting. 118 Cong. Rec. 9528 (1972).

Amendment 1070: "This article shall not impair the validity, however, of any laws of the United States or any State which secure privacy to men or women, boys or girls." Defeated: 79 nays, 11 yeas, 10 not voting. 118 Cong. Rec. 9531 (1972).

Amendment 1071: "This article shall not impair the validity, however, of any laws of the United States or any State which make punishable as crimes sexual offenses." Defeated: 71 nays, 17 yeas, 12 not voting, 118 Cong. Rec. 9537 (1972).

These amendments were offered as substitute texts for ERA:

Amendment 472: "Neither the United States nor any State shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or committee reports. Many state legislatures do not keep a journal which records debates. Many state legislatures enacted State ERAs (as well as ratifications of the Federal ERA) with little or no debate. There is no significant evidence to prove that the legislative intent of the State ERAs requires an absolute standard of interpretation.

The Textual Differences

Articles and discussions of State ERAs use many different figures for the total number of states which have allegedly enacted an Equal Rights Amendment into their constitutions. The number is uncertain because of the variety in the language of the State ERAs. Constitutional provisions with different language will obviously produce different results.

In order to examine the hypothesis that the effect of State ERAs can be extrapolated into a valid prediction of what the proposed Federal ERA, if ever ratified, would accomplish, it is necessary first to compare the text of the proposed Federal ERA with those of the seventeen states which are sometimes alleged to have enacted a State ERA.

The proposed Federal Equal Rights Amendment, passed by Congress and sent to the states to start the ratification process on March 22, 1972, reads in full as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

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functional differences between them." Defeated: 78 nays, 12 yeas, 10 not voting. 118 Cong. Rec. 9538 (1972).

Amendment 1044: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seductions, or other sexual offenses." Defeated: 82 nays, 9 yeas, 9 not voting. 118 Cong. Rec. 9540 (1972).

> Section 3. This amendment shall take effect two years after the date of ratification.[7]

No state, of course, has put the full Federal ERA language into its state constitution. No State ERA has a "Section 2" giving Congress the power of enforcement or shifting any power from the states to the federal government.

A clause identical to Section 2 appears in seven other amendments to the U.S. Constitution. Many Supreme Court cases since 1965 have interpreted the identical enforcement clause in the Thirteenth, Fourteenth and Fifteenth Amendments in a way that accomplishes a transferral of power from the states to the Congress that is even broader than the Necessary and Proper Clause or the Commerce Clause. These decisions shifted from the states to the federal domain powers over elections,[8] private property,[9] and private schools.[10]

This same enforcement clause grants Congress not only the power to enforce Section 1, but also the power to define what Section 1 means and to preempt valid state laws in order to substitute its decision-making power for that of the states.[11] Supreme Court cases have also greatly expanded the definition of the scope of the state action that activates these constitutional amendments and their enforcement clauses and have held that the involvement of the state need not "be either exclusive or direct."[12]

Just as the identical enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments have transferred from the states to the federal government the enforcement and preemption power over the subject-matter of Section 1 of those amendments, Section 2 of the Federal ERA would likewise transfer from the states to the federal government the enforcement and preemption power over the subject-matter of Section 1 of ERA, namely, all state laws that have traditionally made distinctions based on sex. This would include laws governing marriage, divorce, child custody, family property, inheritance, widow's privileges, homosexual activity, abortion, prison regulations, insurance rates, and private schools.

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[7] H. R. J. Res. 208, 92d Cong., 1st Sess. (1971).

[8] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Dougherty County, Georgia, Board of Education v. White*, 58 L. Ed. 2d 269 (1978) (holding that a school board in Georgia had to secure federal approval before enacting a regulation requiring its employees to take a leave of absence from a paid job when running for political office).

[9] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

[10] *Runyon v. McCrary*, 427 U.S. 160 (1976).

[11] *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[12] *United States v. Guest*, 383 U.S. 745, 755 (1966); *see also United States v. Price*, 383 U.S. 787 (1966).

That the enforcement power over ERA will be in the hands of the federal government is further confirmed by its legislative history. In all earlier versions of the Federal ERA, from its first introduction into Congress in 1923 until 1971, Section 2 read: "Congress *and the several states* shall have power, *within their respective jurisdictions,* to enforce this article by appropriate legislation." When the version that was finally passed was introduced in 1971, the words emphasized above were deleted.

The reach of Section 2 of ERA is so extensive that Senator Sam J. Ervin, Jr., recognized as the dean of lawyers in the U.S. Senate until his recent retirement, told the Senate on March 22, 1972:

> If this Equal Rights Amendment is adopted by the states, it will come near to abolishing the states of this Union as viable governmental bodies. I think it will virtually reduce the states of this nation to meaningless zeroes on the nation's map. I think it will transfer virtually all the legislative power of government from the states to Congress.[13]

The vast areas of legislation subject to Section 1 of ERA, because of traditional distinctions made between the sexes, make it certain that the shift of power from the states to the federal government under Section 2 of ERA would be even greater than under the enforcement clauses of the Thirteenth, Fourteenth or Fifteenth Amendments. Under the maxim *cui bono*, this effect is more than sufficient to explain the unprecedented efforts made by the executive branch of the federal government to induce state legislatures to ratify ERA.[14]

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13. 118 Cong. Rec. 9566 (1972).

14. *E.g.*, the spending of $5 million by the National Commission on the Observance of International Women's Year, which declared that "In

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Even if all fifty states were to adopt a State ERA, their cumulative effect on our unique American federal structure and on our methods of fighting wars would be miniscule compared to the vast changes that would be compelled by the Federal ERA.

Putting aside the tremendous effect of Section 2 of the Federal ERA, we will now compare the various State ERAs with Section 1 of the Federal ERA in order to determine whether the State ERA experience offers any guidance as to what the proposed Federal ERA, if ever ratified, would accomplish. In this analysis, we should keep in mind the limited jurisdiction of the State ERAs and the fact that state court determinations about State ERAs would not be binding on federal court interpretations of the Federal ERA.

Ambiguous Terminology

It should also be pointed out that nowhere in the Federal or in any State ERA are the terms "equality of rights" or "sex" defined. The former is not a term of art for which there are legislative, judicial, or dictionary definitions. It is a nebulous phrase that can mean different things to different people, especially in situations in which different results would be obtained depending on which quality of the asserted right is being equalized. The phrase came into our constitutional lexicon without any judicial history to circumscribe its scope. "Sex" is a word with a half dozen different dictionary definitions which may be loosely divided into (a) the sex you are

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April 1975 the IWY Commission members were appointed and on April 14 and 15 the full IWY Commission met for the first time and chose ratification of the Equal Rights Amendment as its top priority issue," that "The following resolution was unanimously passed: The National Commission on the Observance of International Women's Year, as its first public action and highest priority, urges the ratification of the Equal Rights Amendment," and that "As our main commitment to the observance of International Women's Year, we pledge to do all in our capacity to see that the Equal Rights Amendment is ratified at the earliest possible moment." U.S. National Commission on the Observance of International Women's Year, ". . . *To Form A More Perfect Union. . .*": Justice for American Women 219 (1976). And *see* President Carter's Memorandum for the Heads of Departments and Agencies on Equality for Women, 14 Weekly Comp. of Pres. Doc. 1335 (July 20, 1978) (directing all federal officials to lobby for ratification of the proposed Federal ERA).

and (b) the sex you do. No ERA tells us which definitions of sex are covered. No ERA excludes any definitions of sex.

Comparing the texts reveals that some prohibit a denial of rights only *by state action*, but others have no such limitation, indicating a broad application to activities by private citizens. The phrase that makes this difference is usually "by the state." The words "under the law" do not necessarily determine the state-action limitation; it can be argued that we are all "under the law."

Despite the large number of states that are alleged to have State ERAs, the texts reveal a great difference in language, and experience reveals a great difference in effect.

The Colorado Constitution reads: "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex." [15]

The Hawaii Constitution reads: "Equality of rights under the law shall not be denied or abridged by the state on account of sex." [16]

The Maryland Constitution has the same language but does not limit the scope to state action: "Equality of rights under the law shall not be abridged or denied because of sex." [17]

Two state constitutions, which have language similar to the proposed Federal ERA, do not limit the scope of control to state action, but do limit the benefits to individuals. The Pennsylvania Constitution reads: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[18] Note that the language says "in" Pennsylvania, not "by" Pennsylvania. The New Mexico Constitution reads: "Equality of rights under law shall not be denied on account of the sex of any person." [19]

No case has yet addressed the issue of what difference it may make to limit the benefits to individuals or to persons. It would appear to exclude corporations from having a cause of action. It should surely exclude non-human rights; it was suggested during the debate on the Federal ERA that it is broad enough to outlaw any distinction between, say, male and female dogs.

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[15] Colo. Const. art. 2, §29 (adopted Nov. 7, 1972; effective Jan. 11, 1973).

[16] Hawaii Const. art. 1, §21 (adopted Nov. 7, 1972).

[17] Md. Const. art. 46 (ratified Nov. 7, 1972).

[18] Pa. Const. art. 1, §28 (adopted May 18, 1971).

[19] N.M. Const. art. 2, §18 (adopted Nov. 7, 1972; effective July 1, 1973).

It could also be argued that the Pennsylvania and the New Mexico State ERAs would not cover collective rights. This could be an important field because the prohibition of discrimination on the basis of sex which appears in Title VII and Title IX of the Federal Civil Rights Act has been interpreted by the courts and by federal agencies in the employment and education fields, respectively, as permitting or requiring affirmative action on a group, or collective, basis. [20] Although the word "quota" is almost never used, the targets, goals, timetables, and profiles are expressed in statistical terms to measure members of an identifiable group. Since affirmative action programs accord rights to groups rather than to individuals, it could be argued that the Pennsylvania and New Mexico State ERAs would not permit affirmative action. The original sponsors of the Federal ERA certainly planned it to include affirmative action for women and so stated in congressional debate. [21]

The Washington State ERA adds the phrase "and responsibility": "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." [22] That extra word is explicit recognition of the fact that the sex-neuterization of legislation involves imposing responsibilities as well as granting rights. One person's right may be another's responsibility or duty.

The Alaska Constitution is one of several state constitutions that limit the application of ERA to civil and political rights: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin."[23] This language would include political rights such as voting and running for office and civil rights such as freedom of speech, press, religion, travel, education, the right to make contracts, to sue and to engage in a useful occupation. Arguably, this language might exclude the various rights which are not civil or political rights, such as preferential property rights and support and custody rights belonging to wives, insurance benefits, or fringe benefits in employment.

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[20] *See, e.g., EEOC v. American Telephone & Telegraph Co.*, 365 F. Supp. 1105 (E. D. Pa. 1973).

[21] *See, e.g.*, Brown, Emerson, Falk, & Freedman, "*The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*," 80 Yale L. J. 871, 904. The authors assert that affirmative action for women is wholly compatible with the absolute nature of ERA.

[22] Wash. Const. art. 31 §1 (approved Nov. 7, 1972).

[23] Alas. Const. art. 1, §3 (approved Aug. 22, 1972; effective Oct. 14, 1972).

The Montana Constitution is similar: "Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."[24] This language is broad in that it extends to all kinds of private action as well as governmental action, but it is limited in scope to civil and political rights.

The Illinois Constitution has one of the so-called State ERAs that are not "equal rights" amendments at all because they do not use the undefined "equality of rights" language. The Illinois Constitution uses the familiar and judicially more precise language of the Fourteenth Amendment: "The equal protection of the laws shall not be denied or abridged on account of sex by the state or its units of local government and school districts."[25] "Equal protection of the laws," through a century of litigation, has not been held to mean that every person must be treated equally, but that persons similarly situated must be similarly treated, thereby allowing classifications for rational legislative purposes. The "equal protection" amendments, therefore, have a wholly different parentage from that of the "equal rights" amendments. It is a mistake to assert that a state has an ERA when it actually has an EPA (Equal Protection Amendment).

Connecticut also has an "equal protection" amendment instead of an "equal rights" amendment: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex."[26]

In another group of states, "sex" is simply included in a catchall anti-discrimination provision. While the language may appear to be as strict as that of the Federal ERA, the courts have not construed this type of State ERA as requiring an absolutist interpretation. Although this difference is nowhere explained in judicial opinions, it is reasonable to argue that the legislative history and adoption by the voters of a general provision barring discrimination against various minorities do not reveal sufficient identification of the "sex" issue to justify overturning traditional, rational differences of treatment between males and females.

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[24] Mont. Const. art. 2, §4 (adopted June 6, 1972).

[25] Ill. Const. art. 1, §18 (adopted Dec. 15, 1970; effective July 1, 1971).

[26] Conn. Const. art. 1, §20 (adopted Nov. 5, 1974).

The Texas Constitution states: " Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."[27]

The New Hampshire Constitution reads: "Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."[28]

Massachusetts was the most recent state to insert a general anti-discrimination provision into its Constitution: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."[29]

The Virginia Constitution also uses general anti-discrimination language but adds an express qualifying clause that carves a clear exception to the otherwise broad mandate. ". . . the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination."[30] That last clause should eliminate the restroom argument in connection with the Virginia ERA.

Pitfalls of An Absolute Mandate

The Virginia State ERA proves that constitutional draftsmen know that a prohibition against all sex discrimination also bans sex-separation unless that is specifically excepted. Ever since *Brown v. Board of Education*[31] in 1954, it has been constitutionally clear that, in matters of race, separate-but-equal is not equal but discriminatory. The obvious implications of the unique language in the Virginia ERA probably explain why ERA proponents usually omit Virginia from the list of states having a State ERA. The Connecticut ERA forbids segregation because of sex, but that must be read in the context of the equal-protection language which permits rational classifications.

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[27] Tex. Const. art. 1, §3a (adopted Nov. 7, 1972).

[28] N. H. Const. Pt. 1, art. 2d (1974).

[29] Mass. Const. art. 1 (adopted Nov. 2, 1976).

[30] Va. Const. art. 1, §11 (ratified Nov. 3, 1970; effective July 1, 1971).

[31] 347 U.S. 483 (1954).

The Louisiana Constitution also proves that some states fully understand the pitfalls of an absolute mandate against all sex discrimination and want to guard against its rigidity. Its constitutional provision has a unique wording: "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."[32]

The Utah and Wyoming provisions are also usually omitted from lists of State ERAs on the pretext that they were enacted in the 1890s and, therefore, are not relevant to the current controversy. However, their language is just as modern.

The Utah Constitution reads: "The rights of citizens of the state of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall enjoy equally all civil, political and religious rights and privileges."[33] The Utah ERA sounds as though it were written in the 1970s. Perhaps those who exclude Utah from the discussion would rather not call public attention to the fact that Utah – which has repeatedly refused to ratify the Federal ERA – gave women the right to vote a full generation before the Women's Suffrage Amendment was added to the U.S. Constitution.

The Wyoming Constitution reads: "Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."[34]

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[32] La. Const. art. 1, §3 (adopted Apr. 20, 1974; effective Jan. 1, 1975).

[33] Utah Const. art. 4, §1 (1896).

[34] Wyo. Const. art. 1, §3 (1890).

Determining the intent of the legislatures and of the voters (in states which require referenda on state constitutional amendments) who approved State ERAs is made extremely difficult by the way the operative language was often surrounded by other language, especially in the constitutions of those states where sex was included in a general prohibition against discrimination on account of race, creed, color, or national origin. In the 1970s, there was almost no way such a proposal could fail. The debate on sex equality could hardly be separated from the rest of the clause, either in debate or in the minds of the legislators or citizens.

Furthermore, many states added other language which made identification of the sex-equality issues almost impossible. Thus, the ballot which confronted the Massachusetts voters on election day in November 1976 asked for a yes or no vote on a paragraph that looked like an excerpt from the *Declaration of Independence*:

> All people are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and health. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.[35]

After passage, the voters were told they had approved a State ERA, and litigation began to try to enforce it as an absolute standard.

Several states buried their State ERAs in a section that starts with non-controversial language already included in the U.S. Constitution. Montana preceded its ERA, in the same paragraph, with: "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws."[36] The New Mexico Constitution's ERA starts off like this: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws."[37] The Louisiana

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[35] Mass. Const. art. 1 (adopted Nov. 2, 1976).

[36] Mont. Const. art. 2, §4 (adopted June 6, 1972).

[37] N. M. Const. art. 2, §18 (adopted Nov. 7, 1972; effective July 1, 1973).

ERA paragraph starts with: "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations."[38] Many states have Bill of Rights and Equal Protection language somewhere in their constitutions. The point here is that it is difficult to detect a legislative or a people's intent to impose an absolute-standard ERA when ERA was the last sentence in a paragraph of familiar, respected, redundant constitutional language.

When an ERA is put into any constitution, what becomes the law of the state is not merely an idea or a hope or a goal, but a specific set of words that must be obeyed. Those words either have definite meanings in the English language or, if the meanings are imprecise, they will be defined later by the courts.

The wide variations in the language of the various State ERAs, combined with the imprecision and lack of definition of the operative terms, mean that courts have a wide latitude to do as they please in interpreting the State ERAs and the State EPAs (Equal Protection Amendments). There is absolutely no assurance that the courts of one state will follow the interpretation of another or that the federal courts will follow any state court.

So far there has been relatively little litigation based upon State ERAs. There is no indication that the women's movement is instigating test cases to force a speedy judicial clarification of what it would mean to our society to have ERA interpreted on an absolute standard. Enough litigation has taken place, however, to see that a general pattern is emerging in the courts. (a) If possible, courts are avoiding the interpretation of their State ERA by deciding cases on some other basis. (b) In states that have authentic State ERAs (those which contain language closely paralleling Section 1 of the Federal ERA), courts are generally using a literal and inflexible interpretation, following the plain meaning rule. (c) The rest of the so-called State ERA states (whether they have an equal-protection provision or a civil-and-political-rights provision or a race-creed-color-sex provision) are following the standard of review traditional under the Equal Protection Clause of the Fourteenth Amendment;

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[38] La. Const. art. 1, §3 (adopted Apr. 20, 1974; effective Jan. 1, 1975).

that is, a legislature is permitted to classify on a rational basis when the classification is related to a permissible legislative goal and does not violate a fundamental interest.

Of course, where the equal protection analysis is used, the alleged State ERA becomes a constitutional redundancy because all fifty states now enjoy the full protection of the Fourteenth Amendment of the U.S. Constitution.

Only six State ERAs have language sufficiently like Section 1 of the Federal ERA that they can reasonably be considered to offer guidance about the meaning and effect of the proposed Federal ERA: Colorado, Hawaii, Maryland, Pennsylvania, New Mexico, and Washington.

TALLY ON THE SCOPE OF THE STATE ERAS

Same language as the Federal ERA: No state affects any federal laws or shifts any power from the states to the federal government.	0
*Same language as Section 1 of the Federal ERA: Colorado, Hawaii	2
*Same language as Section 1 of the Federal ERA, but not limited to state action: Maryland, Washington	2
*Same language as Section 1 of the Federal ERA, but limited to individuals or persons: New Mexico, Pennsylvania	2
Limited by express exception for the separation of the sexes: Virginia	1
Limited to unreasonable discriminations only: Louisiana	1
Limited to civil, political and religious rights only: Alaska, Connecticut, Montana, Utah, Wyoming	5
Limited to equal-protection-type coverage, which allows rational classifications: Connecticut, Illinois	2
Limited to state action (not private action): Colorado, Hawaii, Illinois, Louisiana, New Hampshire, Virginia, Wyoming	7

Extended to private action as well as governmental: 10
Alaska, Connecticut, Maryland, Massachusetts, Montana, New Mexico, Pennsylvania, Texas, Utah, Washington

Legislative purpose clouded because sex is only one of many prohibited categories: 6
Connecticut, Massachusetts, New Hampshire Texas, Virginia, Wyoming

Legislative purpose clouded because it follows non-controversial, constitutionally-redundant language: 3
Massachusetts, Montana, New Mexico

Legislative purpose clouded because of enactment in the 19th century: 2
Utah, Wyoming

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*The only State ERAs that should be compared to Section 1 of the Federal ERA.

Effect On Family Law

When proponents were presenting their case for passage of the Federal Equal Rights Amendment to Congress in 1971 and 1972, they used as their principal legal statement about its anticipated effects an article of some one hundred pages in the *Yale Law Journal*. The article was quite frank in proclaiming that the adoption of a Federal ERA "will give strength and purpose to efforts to bring about a far-reaching change which, for some, may prove painful."[39]

The chief victims of these "painful" effects of the "far-reaching change" will be wives and mothers. This is the inescapable conclusion to be drawn from the family law litigation in the states that have adopted authentic State ERAs.

In Washington, which has a State ERA, the court admonished wives to face up to what ERA means:

> It is to be remembered that while the 61st amendment to the Constitution of the State of Washington, approved November 7, 1972, is commonly referred to as the Equal Rights Amendment, it firmly requires equal responsibilities as well. This amendment is the touchstone of the develop-

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[39] Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L. J. 871, 884 (1971).

> ing case and statute law in the area of marriage dissolution.[40]

The holding in this case, *Smith v. Smith*, was that ERA requires equal responsibilities of parents for child support and that the ex-husband can get his support obligations reduced to meet the ERA standard.

Wives have traditionally had in this country a great variety of extensive rights based on their marital status, as a result of our public policy to respect the family as the basic unit of society, and as a statutory and common-law balance to the biological fact that only women have babies. These rights, which vary from state to state, include the wife's right of financial support in an ongoing marriage, the right of separate maintenance and payment of attorney's fees during divorce litigation, the right to alimony after divorce, the right to a presumption of custody of her children, rights against her husband's alienation of his property during his life or by will, and a variety of special benefits accorded to widows.

Such benign discrimination is wholly in harmony with the Equal Protection Clause and was seldom challenged prior to the 1970s. The U.S. Supreme Court in *Kahn v. Shevin*[41] made clear the current constitutionality and relevancy of such preferential statutes designed for the benefit of wives and widows. The Court held that, consistent with the Equal Protection Clause, a legislature can make a rational classification of widows as a class of people who need a special benefit. The Court upheld Florida's property tax exemption for widows. The challenge to the Florida statute was strongly supported by pro-ERA lawyers.

The states that have State ERAs are blazing the trail of the "painful" effects of applying an absolute standard of equality to the marital and parental relationships. They provide a window into which we can look to see what "equality of rights" means when applied to the husband-wife relationship.

Maryland is a State ERA state. In *Coleman v. Maryland*,[42] the Court of Special Appeals held that the statute which makes it a crime for a husband to fail to support his wife is unconstitutional under the State ERA. The court said that this statute

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[40] *Smith v. Smith*, 13 Wash. App. 381, 534 P.2d 1033 (1975).

[41] 416 U.S. 351 (1974).

[42] 37 Md. App. 322, 377 A.2d 553 (1977).

"establishes a distinction solely upon the basis of sex" and "such distinctions are now absolutely forbidden" by the State ERA.

The court discussed the social policy and the history of the law which made it the duty of the husband to support his wife, calling it "warp and woof of the prevailing ethos" of the nineteenth century. All that is changed now, according to the court; "that view has been subjected to a series of violent cultural shocks. The Equal Rights Amendment of 1972 more accurately reflects the ethos or zeitgeist of this time." The court held that the support statute "is no longer the public policy of this state."

Newspapers which had been strong supporters of ERA were made very uncomfortable by this decision, calling it "an unfortunate conflict" of sexual justice, but admitted that the court had "no alternative" under the State ERA. The newspapers accurately pointed out that, while imprisonment for nonsupport is seldom imposed, the threat of imprisonment is a most valuable and necessary tool "to impress upon husbands their financial responsibility."[43] It is almost the only tool available to reduce the welfare rolls because, in the absence of this law and the remedies available under it, a large group of women become the financial responsibility of the taxpayers.

Pennsylvania is a State ERA state and, because of the State ERA, wives have lost their common law and statutory right to have their necessaries paid for by their husbands.

This common law right has been a right of wives for centuries and is an essential ingredient of the concept of the right of the wife to be supported in her home. The Pennsylvania statute read as follows:

> In all cases where debts may be contracted for necessaries for the support and maintenance of the family of any married woman, it shall be lawful for the creditor in such case to institute suit against the husband and wife for the price of such necessaries, and after obtaining a judgment, have an execution against the husband alone.[44]

In *Albert Einstein Medical Center v. Gold,*[45] the issue was whether, under the law which obligated the husband to pay for his wife's necessaries, the State ERA would obligate the wife to pay for her husband's necessaries. The *Gold* court held the law unconstitutional under the State ERA but, instead of invalidating it, extended the husband's liability to the wife and required her to pay for her husband's medical and hospital expenses.

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[43] *Baltimore Sun*, Sept. 26, 1977, Editorial, at A12

[44] 48 Pa. Cons. Stat. 116.

[45] 48 Pa. Fiduc. 337, 66 Pa. D. & C. 2d 347 (1974).

In *Gold*, the court apparently could not resist this caveat to wives:

> The matter before us is yet another example of the impact of the Equal Rights Amendment upon the lives of all citizens of the Commonwealth and, once again, demonstrates that those who seek to expand the equal rights concept must be prepared to accept the burdens as well as the benefits of such expansion.

The court did not say what the "benefits" are, but *Gold* and the subsequent "necessaries" cases described below surely make clear some of the burdens.

Two years later in *Albert Einstein Medical Center v. Nathans*,[46] the court faced the same law in its traditional circumstances: the question of payment for a wife's necessaries. The "necessaries" involved in this case were medical and hospital services provided to the wife in an ongoing marriage which were conceded to be "necessary for her health, well-being and comfort." The court simply nullified the common law and statutory responsibility of a husband to pay for his wife's "necessaries," noting that these include not only medical care, but also food, clothing, and shelter.

The court waxed very righteous in applying the absolute standard under the State ERA. The court held that "all legal distinctions based on the male or female role in the marital relationship are rendered inoperative by the [State ERA] amendment" and that the common law concept obligating the husband to pay for his wife's necessaries is "repugnant to the Equal Rights Amendment." The court took judicial notice of what it called "medical and scientific advances which have increased both production and population . . . have made birth control a desirable social objective, and have been factors liberating her [a wife] from the common law requirements that tethered her to her husband and her husband's home."

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[46] *Legal Intelligencer*, Aug. 24, 1977, at 1, col. 1 (Phila. County Ct. C. P. 1977).

'Painful' Effects of ERA

Thus, it is clear that whichever way a State ERA is interpreted by the courts – to extend liability to both sexes as in *Gold* or to nullify the husband's liability as in *Nathans* – the Pennsylvania wife suffers the "painful" effects of the "far-reaching change" forced upon her by the State ERA.

A year later in *Nan Duskin, Inc. v. Parks*,[47] the same court "confirm[ed]" the *Nathans* decision, again calling the law that a husband is liable for his wife's necessaries "repugnant" to the State ERA. The court further justified and affirmed the *Nathans* approach over the earlier *Gold* approach, saying, "where a rule of law is repugnant to the Constitution it is the duty of the court to strike it, not to add provisions to it that will make it conform to the constitutional provision. The latter function is legislative."

The *Duskin* court further explained that "reliance on the Support Law, 62 P.S. 1921, adds nothing to defendant's position [because the] duty to support based on family relationship depends on dependence and indigency." In other words, although the Support Law was not the principal issue in this case, the court clearly pointed the "developing" law in the direction of establishing indigency or dependency as the only basis for a wife's claim of financial support from her husband in a state with a State ERA. Under ERA, a wife will have no claim to the financial support of her husband just because she is a wife and mother.

The implications of these decisions for the social and economic integrity of the family unit are "far-reaching" indeed. In the ERA world, there will be no right of the homemaker to make her career in the home unless she can prove she is indigent or about to go on welfare.

In *DiFlorido v. DiFlorido*,[48] the Pennsylvania Supreme Court nullified the presumption of a husband's ownership of household goods used and possessed by both spouses and replaced it with a presumption upon divorce that such property is jointly owned. The ERA proponents claim that this case is a gain for wives. Actually it isn't necessarily any such thing.

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[47] *Legal Intelligencer*, Mar. 15, 1978, at 1, col. 1 (Phila. County Ct. C. P. 1978).

[48] 459 Pa. 641, 331 A. 2d 174 (1975).

Divorce settlements have traditionally awarded the house and its effects to the wife. To any extent that *DiFlorido* may be beneficial, the same result could have been secured by statutory change or an equal protection suit.

In *Henderson v. Henderson*,[49] the Pennsylvania Supreme Court ruled that the statute which allowed payment of alimony *pendente lite* (support during litigation), counsel fees and expenses to wives is unconstitutional under the State ERA. Before the court could nullify or extend the old law, the legislature extended liability for such payment to wives. Thus, the State ERA has cost wives their exclusive right to receive alimony *pendente lite*, counsel fees and expenses, and wives have acquired the new "right" to have the court hold them liable to make similar payments to their husbands.

The court again lectured wives on their new marital relationship under the State ERA:

> The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and legal responsibilities. The law will not impose different benefits or different burdens upon the members of a society based on the fact that they may be man or woman. . . . The right of support depends not upon the sex of the petitioner but rather upon need in view of the relative financial circumstances of the parties.

This decision puts the Pennsylvania Supreme Court's imprimatur on the notion that, under ERA, the only wives who can claim support from their husbands are indigent wives.

In *Wiegand v. Wiegand*,[50] the Pennsylvania Superior Court nullified the statutory rights of wives to divorce from bed and board (separate maintenance) and to receive alimony *pendente lite* and attorneys' fees, as unconstitutional under the State ERA. The subsequent reversal by the Pennsylvania Supreme Court resulted only because the ERA had been improperly raised *sua sponte* by the Superior Court rather than being raised by the parties.

In *Conway v. Dana*,[51] the Pennsylvania Supreme Court invalidated under the State ERA the statute that placed the primary duty of support for a minor child on the father. The court stated that this

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[49] 458 Pa. 97, 327 A. 2d 60 (1974).

[50] 226 Pa. Super. Ct. 278, 310 A. 2d 426 (1973), *rev'd*, 461 Pa. 482, 337 A. 2d 256 (1975).

[51] 456 Pa. 536, 318 A. 2d 324 (1974); the Maryland ERA had a similar effect in *Rand v. Rand*, 280 Md. 508, 374 A. 2d 900 (1977).

> presumption is clearly a vestige of the past and incompatible with the present recognition of equality of the sexes. The law must not be reluctant to remain abreast with the development of society and should unhesitatingly discard former doctrines that embody concepts that have since been discredited.

Again, the court gave its views on how the marital relationship should be structured: "Support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father." Note that the court did not say that the *duties* of parents are equal; the court said that *"every" duty* of parenthood is the "equal responsibility of both mother and father." One wonders how the court would equalize "every" duty of parenthood.

In any event, under *Conway* and the State ERA, wives have now lost their right to have their husbands provide the primary support for their minor children, and wives have acquired the new "right" to be equally liable for the financial support of their children.

In *Commonwealth ex rel. Spriggs v. Carson*,[52] the Pennsylvania Supreme Court put fathers and mothers on an equal footing in regard to child custody. The court called the "tender years" doctrine (under which mothers were presumed to be entitled to custody of their children of "tender years") "offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this jurisdiction."

So, under the State ERA, mothers have lost the presumption that they should have custody of their children.

In *Adoption of Walker*,[53] the Pennsylvania Supreme Court extended to unwed fathers the requirement for consent to adoption of their illegitimate children. The court held that the State ERA invalidated Section 411 of the Adoption Act which provided: "In the case of an illegitimate child, the consent [to adoption] of the mother only shall be necessary." The court held that this distinction between unwed mothers and unwed fathers is "patently invalid" under the State ERA.

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[52] 470 Pa. 270, 368 A. 2d 635 (1977). Although the issue was raised *sua sponte* by Justice Nix, the Pennsylvania Superior Court held his opinion controlling when the issue was properly raised by the parties in *McGowan v. McGowan*, 248 Pa. Super. Ct. 41, 374 A.2d 1306 (1977).

[53] 468 Pa. 165, 360 A. 2d 603 (1976).

The result of this decision is that an unmarried girl or woman, who is pregnant and wants to place her baby with loving adoptive parents so she can start a new life, will not be able to complete adoption proceedings unless she first identifies the father and secures his consent to adoption. This could be a great injustice to an especially vulnerable woman, invade her right to privacy, or induce her to have an abortion rather than have to identify the father.

In *Hopkins v. Blanco*,[54] the Pennsylvania Supreme Court extended the right to recover damages for loss of consortium to wives as well as husbands. ERA proponents claim that this is a gain for women under a State ERA since, under common law, this right belonged to husbands only. But the proof that ERA is not necessary to extend the right of consortium to wives is the fact that courts in non-ERA states have come to the same decision under the Equal Protection Clause. Among the numerous non-ERA states that have extended the right of consortium to wives are Arkansas,[55] California,[56] Delaware,[57] Georgia,[58] Iowa,[59] Michigan,[60] Mississippi,[61] Missouri,[62] Nebraska,[63] New Jersey,[64] New York,[65] Ohio,[66] Oregon,[67]

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[54] 457 Pa. 90, 320 A. 2d 139 (1974).

[55] *Mo. Pac. Transp. Co. v. Miller*, 227 Ark. 351, 299 S. W. 2d 41 (1957).

[56] *Gist v. French*, 136 Cal. App. 2d 247, 288 P. 2d 1003 (1955).

[57] *Stenta v. Leblang*, 55 Del. 181, 185 A. 2d 759 (1962).

[58] *Brown v. Georgia Tennessee Coaches, Inc.* 88 Ga. App. 519, 77 S. E. 2d 24 (1953).

[59] *Acuff v. Schmit*, 248 Iowa 272, 78 N. W. 2d 480 (1956).

[60] *Owen v. Illinois Baking Corp.*, 260 F. Supp. 820 (1966); *Montgomery v. Stephan*, 359 Mich. 33, 101 N. W. 2d 227 (1960).

[61] *Delta Chevrolet Co. v. Waid*, 211 Miss. 256, 51 So. 2d 443 (1951).

[62] *Manley v. Horton*, 414 S. W. 2d 254 (1967).

[63] *Cooney v. Moomaw*, 109 F. Supp. 448 (1953).

[64] *Ekalo v. Constructive Services Corp. of America*, 46 N. J. 82, 215 A. 2d 1 (1965).

[65] *Millington v. Southeastern Elevator Co.*, 22 N. Y. 2d 498, 239 N. E. 2d 897, 293 N. Y. S. 2d 305 (1968).

Rhode Island,[68] and South Dakota.[69]

Colorado is a State ERA state. The legislature was not satisfied with the failure of the court to impose an absolute standard in a felony nonsupport case[70] and so accomplished the task legislatively by neuterizing the statute. Whereas the Colorado statute formerly obligated "man" to support "wife," the new law now reads "person" must support "spouse," which is not the same thing at all. Now a wife shares equally in the obligation to support her family under the threat of criminal conviction of a class-five felony.[71]

The other State ERA states, New Mexico and Hawaii, have had almost no family law litigation in which the courts have interpreted the State ERA.

State Funding for Abortions

One lawsuit in Hawaii, however, is worthy of mention. On January 19, 1978, the Hawaii Right to Life brought suit against the State of Hawaii to enjoin the state from funding elective abortions. Two abortion doctors moved to intervene, alleging that they have a legal right to reimbursement for the performance of elective abortions. They alleged in their petition that this right to reimbursement rests on Hawaii's State ERA:

> Applicants' first claim to reimbursement as a matter of right rests on the Hawaii Constitution's guarantees of due process and equal protection and Article I, Sec. 21 which provides that "equality of rights under the law shall not be denied or abridged by the state on account of sex." Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex.[72]

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[66] *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 22 Ohio St. 65, 258 N. E. 2d 230 (1970).

[67] *Smith v. Smith*, 205 Or. 286, 287 P. 2d 572 (1955).

[68] *Mariani v. Nanni*, 95 R. I. 153, 185 A. 2d 119 (1962).

[69] *Hoekstra v. Helgeland*, 78 S. D. 82, 98 N. W. 2d 669 (1959).

[70] *People v. Elliott*, 186 Colo. 65, 525 P. 2d 457 (1974).

[71] Colo. Rev. Sta. §14-6-101.

[72] *Hawaii Right to Life, Inc. v. Chang et al.*, Civ. No. 53567 (1st Civ. 1978); Motion to Intervene by Goto and Spangler, at 7.

The judge denied the motion of the abortionists, but he did not address the ERA argument.

Interestingly, one of the attorneys for the intervenors was Judy Levin of the Reproductive Freedom Project of the American Civil Liberties Union in New York. This claim obviously reflects the argument which abortion lawyers will use in litigation under State and Federal ERAs. Abortion has already been legalized under *Roe v. Wade.*[73] The State or Federal ERA may give a constitutionally-based claim to government-funded abortions, which is not a right under our existing Constitution.[74]

The cases in which a State ERA was at issue make it clear that any benefit to the woman could have been gained just as easily under the Equal Protection Clause. Where the ERA made a unique constitutional difference, it always resulted in a loss to the woman, especially to the wife and mother. In nearly every case in which the State ERA changed prior law, women were needlessly deprived of longstanding legal rights.

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Turning now to the purported ERA state constitutions which do not have authentic Federal ERA-type language, the cases reveal an entirely different pattern. Courts in those states simply do not employ the absolute standard used in Pennsylvania and Maryland. Where the court uses equal protection analysis, the results are not significantly different from those that would be obtained under the Fourteenth Amendment. This has dismayed some proponents of the absolutist approach. Here is how one commentator revealed disappointment:

> Judicial reaction to the sex equality provision of the Texas ERA . . . generally has been disappointing. Some decisions seem to accord no greater significance to this constitutional amendment than might be accorded a relatively trivial legislative amendment to the Uniform Commercial Code.[75]

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[73] 410 U.S. 113 (1973).

[74] *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

[75] Schoen, *The Texas Equal Rights Amendment in the Courts – 1972-1977: A Review and Proposed Principles of Interpretation*, 15 Houston L. Rev. 537, 629 (1978).

Thus, in *Cooper v. Cooper*,[76] the court held that the Texas ERA was not violated by an unequal division of community property and child support obligations favoring the wife upon divorce. In *Friedman v. Friedman*,[77] the court held that the obligation to support children does not require mathematically equal contributions from both parents and that the care provided by the mother should be considered as well as money.

Illinois, an Equal Protection rather than an ERA state, has had a similar experience. In *Randolph v. Dean*,[78] the court held that the presumption favoring a mother's custody of her children may be constitutionally considered as one factor among several.

The Virginia Supreme Court specifically held that the State ERA is "no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." In *Archer v. Mayes*, the court said " . . . women are still regarded as the center of the home and family life and they are charged with certain responsibilities in the care of the home and children."[79]

The Louisiana Supreme Court uses the rational relationship test in interpreting its so-called State ERA. In *State v. Barton*,[80] the court held that a state criminal neglect statute applicable only against husbands is valid under the Louisiana Constitution.

In sum, therefore, the Equal Protection Clause is more than adequate to eliminate obsolete and unjust discriminations and more just, because it allows rational classifications based on the obvious physical differences and differing family responsibilities of women and men. In the states where the so-called State ERA is really just a variation of the Equal Protection Clause, wives have not lost their traditional rights.

In the six states which have an authentic State ERA, however, the courts are using an absolutist standard of review, and the result is indeed "painful" for wives and mothers. The authentic State ERAs provide guidance for what Section 1 of the Federal

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[76] 513 S. W. 2d 229 (Tex. Civ. App. – Houston 1st Dist. 1974, no writ).

[77] 521 S. W. 2d 111 (Tex. Civ. App. – Houston 14th Dist. 1975, no writ).

[78] 27 Ill. App. 3d 913, 327 N. E. 2d 473 (1975).

[79] 213 Va. 633, 194 S. E. 2d 707 (1973).

[80] La., 315 So. 2d 289 (1975).

ERA would require on a nationwide basis. The result would indeed be "far-reaching" in its assault on the traditional family and "painful" in its deprivation of longstanding rights of wives and mothers.

Effect on Same-Sex Marriage

Whether persons of the same sex have a right to be issued a marriage license is a question which has been considered several times in recent years under state statutes and under the Fourteenth Amendment. In *Baker v. Nelson,*[81] the Minnesota court held that the prohibition against same-sex marriage does not offend the Equal Protection Clause, because "there is no irrational or invidious discrimination." The court distinguished *Loving v. Virginia*[82] on the ground that "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."

Singer v. Hara[83] is the only case on record in which the right of homosexuals to marry was asserted under a State ERA. The Washington state court held that a denial of a marriage license to persons of the same sex does not violate the State ERA. The court distinguished *Loving v. Virginia* on the ground that any race classification is simply *per se* impermissible.

In upholding the state's action in denying a marriage license to persons of the same sex, the court used four arguments:

(a) The court stated that it is "obvious" that a marriage is "the legal union of one man and one woman" and that conclusion is the clear implication of state statutes. But this begs the question. The question is not what the statutes mean, but whether the statutes are constitutional under the State ERA. The court ignored the fact that the whole thrust of ERA is to remove sex classifications. The customary technique for doing this -- the method massively urged by ERA proponents in all legislative and judicial contexts – is to delete the so-called sexist words such as man and woman from the statutes, replacing them with sex-neutral words such as person, taxpayer, and spouse.

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[81] 291 Minn. 310, 191 N. W. 2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

[82] 388 U.S. 1 (1967).

[83] 11 Wash. App. 247, 522 P. 2d 1187 (1974).

(b) The court relied on its beliefs about the intent of the people in approving the State ERA: "We do not believe that approval of the ERA by the people of this state reflects any intention upon their part to offer couples involved in same-sex relationships the protection of our marriage laws." The evidence which the court relied on for this conclusion is, to say the least, inconclusive. First, the court quoted the "Statement against" the State ERA contained in the official 1972 Voters' Pamphlet published by the Secretary of State: "HJR 61 would establish rules in our society which were not intended and which the citizenry simply could not support. Examples are numerous: . . . 3) Homosexual and lesbian marriages would be legalized. . . ." The Secretary of State's Voters' Pamphlet did not deny this point. In order to refute the point about homosexual marriages, the court chose as its evidence an article from the *Seattle Post-Intelligencer* which quoted anonymous ERA proponents describing the opponents' arguments generally as "emotional, irresponsible fantasies, misleading, deceptive and incorrect. HJR 61 would have none of the affects [sic] listed above, they say." On the basis of such anonymous invective in a newspaper article, the court presumed to determine the voters' intent.

(c) The court held against the same-sex appellants because they "have failed to make a showing that they are somehow being treated differently by the state than they would be if they were females." But the truth of this statement depends on the pronoun "they." Although the case is called *Singer v. Hara*, the appellants were Singer and Barwick, two males. The court is correct that "they" (appellants Singer and Barwick, both males) were not treated differently from the way the state would have treated them if "they" had been two females applying for a marriage license. But if Singer alone had brought the case, the court could not have made the above statement because Singer, a male, in applying for a marriage license to marry Barwick, a male, was treated very differently indeed from the way he would have been treated if he had been a female applying for a license to marry Barwick, a male. Likewise, if Barwick had brought the case. Did Singer lose because he brought the case with Barwick instead of alone?

(d) Finally, the court argued that "the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'" That is true, but this traditional view of marriage is anathema to the ERA absolutists who want to use ERA to eliminate all vestiges of what they call "sex role determinism in the law." Furthermore, the state does not prohibit the marriage of heterosexuals who expect to remain childless.

Those opposed to the granting of marriage licenses to homosexuals can rejoice that the Washington state court upheld the traditional view of marriage against attack under a State ERA. But it is clear that the arguments used by the court are simply not compatible with the arguments used by courts to invalidate other statutes under State ERAs. The *Singer* decision is out of touch with the absolutism enforced by other courts when rights are asserted under a State ERA. It is easy to see how courts in other states could reject the reasoning of *Singer* and come to the opposite conclusion. And there is no reason to believe that the federal courts will feel in any way bound by the *Singer* court.

After the Pennsylvania State ERA was adopted, Governor Milton Shapp issued Executive Order 1975-5 committing the state to work against discrimination based on sexual preference. The Commonwealth Court dismissed a complaint against it on the grounds that the court could not interfere with a policy decision made by the executive branch. On June 23, 1977, the Pennsylvania Supreme Court affirmed the lower court ruling that the Governor acted within his executive powers.[84]

The homosexual community has in recent years conducted a highly aggressive pursuit of its claims in Congress, state legislatures, city councils, and the media. It is reasonable to believe that it would initiate expensive litigation to achieve all it seeks, in one grand coup, through a federal constitutional amendment that would prohibit any denial of rights "on account of sex." It should be recalled that no ERA puts "women" in the constitution; all ERAs put "sex" in the constitution.

In litigating under the Federal ERA, the homosexuals will not only have the plain meaning of the language in their favor, but also the legislative history. Senator Sam J. Ervin, Jr., proposed an Amendment to the Federal ERA, which stated: "Neither the United States nor any state shall make any legal distinction between the rights and responsibilities of male and female persons unless such distinction is based on physiological or functional differences between them."[85] This modifying clause that would have exempted same-sex marriages from the Federal ERA mandate was soundly defeated.

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[84] *Robinson v. Shapp*, 23 Pa. Commw. Ct. 153, 350 A.2d 464 (1976), *aff'd per curiam*, 473 Pa. 315, 374 A. 2d 533 (1977).

Before the effect of ERA on homosexual marriages became so publicly controversial, many ERA proponents were quite open in predicting that ERA would require that marriage licenses be issued to persons of the same sex. For example, Rita Hauser, United States representative to the United Nations Human Rights Commission, stated in her address on ERA to the American Bar Association Annual Meeting in St. Louis in August 1970: "I also believe that the proposed Amendment, if adopted, would void the legal requirement or practice of the states' limiting marriage, which is a legal right, to partners of different sexes."[86] An article in the *Yale Law Journal* candidly stated the case for this effect of ERA:

> A statute or administrative policy which permits a man to marry a woman, subject to certain regulatory restrictions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines. . . . The stringent requirements of the proposed Equal Rights Amendment argue strongly for . . . granting marriage licenses to homosexual couples who satisfy reasonable and non-discriminatory qualifications.[87]

If the U.S. Supreme Court one day confronts the issue of the asserted right of homosexuals to receive marriage licenses under the Federal ERA, it may come to the conclusion projected by Professor Paul Freund when testifying before the Senate Judiciary Committee: "Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation."[88]

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[85] 118 Cong. Rec. 9538 (1972).

[86] ABA Symposium on Human Rights 62 (1970).

[87] Note, *The Legality of Homosexual Marriage*, 82 Yale L. J. 573, 583 (1972).

Even a leading pro-ERA lawyer and author of a textbook on sex discrimination, Barbara Babcock, admits, "The effect that the Equal Rights Amendment will have on discrimination against homosexuals is not yet clear."[89]

Not yet? When will it become clear? Not until the Supreme Court makes its determination. And that won't be unless and until a case is brought after the Federal ERA is ratified. But then it will be too late to protest if the people don't like the decision.

Effect on Massage Parlors

Laspino v. Rizzo[90] opened up a whole new area of rights under a State ERA which was probably unanticipated by those who supported adding it to the state constitution. The court held that Philadelphia's ordinance prohibiting commercial heterosexual massage "is clearly, palpably and plainly unconstitutional on its face, and the plaintiff is entitled to summary judgment as a matter of law." The court's analysis in *Laspino* exactly contradicts the analysis employed by the *Singer* court, discussed above.

This case makes clear the difference between the Equal Protection Clause of the Fourteenth Amendment, which the Philadelphia ordinance did not violate according to the court, and the State ERA, which the ordinance did violate. The court held that "the test for compliance with the ERA should, in the very least, be more stringent than that imposed under the Equal Protection Clause." The court held that the massage-parlor ordinance was "invalid as violative" of the State ERA, regardless of whether the "absolute standard" or the "compelling state interest standard" was used.

The ordinance treated men and women exactly alike. The court admitted that it was "facially neutral with respect to gender, since it applies with like discrimination to both males and females in declaring that heterosexual massage is illegal." The ordinance read: "No person employed or engaged in the business of a masseur or a masseuse shall treat a person of the opposite sex." Thus, neither males nor females were discriminated against. Male masseurs and female masseuses were treated equally. Males being massaged and females being massaged were treated equally.

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[88] 118 Cong. Rec. 9564 (1972).

[89] B. Babcock, A. Freedman, E. Norton, & S. Ross, *Sex Discrimination and the Law* 180 (1975).

[90] *Legal Intelligencer*, Dec. 2, 1977, at 1, col. 2 (Phila. County Ct. C. P. 1977); *rev'd and remanded*, Pa. Cmmw. Ct., 398 A. 2d 1069 (1979), with merits of ERA arguments not reached because lower court was held to have entered summary judgment improperly.

The court tackled this gender neutrality head-on and asserted, "However mere equal application among the members of the class defined by legislation does not satisfy compelling state interest analysis," citing *Loving v. Virginia*.[91] The court went on to say:

> This utilization of gender as the exclusive basis for distinction is impermissible under the absolute constitutional standard despite the superficial neutrality and equality of opportunity (or the absence thereof) of the ordinance. Equal application does not change the fact that the ordinance varies the treatment to be afforded to two otherwise equally-situated persons only on the basis of what sex they may be.

It is not known whether the court was making a play on words with its expression "equality of opportunity." In any event, the result of the decision was surely to provide "equality of opportunity."

The city defended the massage-parlor ordinance on the ground that it was properly exercising its police power to prevent illicit sexual behavior. The court rejected this argument because the ordinance only prohibited situations "engendering possible heterosexual prostitution, and does not proscribe 'treatment' of males by males, or females by females, which can also provide the setting for 'illicit sexual behavior.'"

Every argument made by the court in *Laspino* could be used to require the city to issue marriage licenses to homosexuals. Senator Birch Bayh has argued that, under the Federal ERA, the denial of a marriage license to two males could be balanced with the denial of a marriage license to two females. But when Philadelphia argued that it was sex neutral to balance the city's refusal to allow a masseuse to massage a male patron with the city's refusal to allow a masseur to massage a female patron, the court said that that type of neutrality is unconstitutional under the State ERA. The court held it to be a sex classification, nevertheless, and a discrimination on account of sex, even though neither males nor females were discriminated against.

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[91] 388 U.S. 1 (1967).

It should be remembered that the language of the Pennsylvania State ERA, like all ERAs, does not put "women" or "gender" into the constitution, but only puts "sex" into the constitution. Sex is a word of many different meanings and is not defined in any ERA. As held in *Laspino*, the "sex" in the State ERA includes the sex in a massage parlor.

Effect on Schools

Two cases in State ERA states have established the new rule that girls must be permitted to compete with boys in all sports, even contact sports such as football.

In *Commonwealth v. Pennsylvania Interscholastic Athletic Association*,[92] the court held unconstitutional under the State ERA a bylaw of the Pennsylvania Interscholastic Athletic Association (PIAA) which prohibited girls from competing against boys in interscholastic competitions. Even though neither of the parties requested it, the court extended its decision to cover football and wrestling. "It is apparent," the court said, "that there can be no valid reason for excepting those two sports from our order in this case."

Granting summary judgment as a matter of law, the court held that the mandate of the State ERA is absolute and must apply to all school sports regardless of any rational arguments that might be presented in behalf of exceptions.

The PIAA had sought to justify its bylaw on the ground that it gave girls "greater opportunities for participation if they compete exclusively with members of their own sex." The PIAA never got its day in court to make its argument.

In *Darrin v. Gould*,[93] the Supreme Court of the State of Washington likewise held that it is sex discrimination under the State ERA to deny girls the right to play on the high school football team. The court cited the "broad, sweeping, mandatory language" of the State ERA that compelled this result.

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[92] 18 Pa. Commw. Ct. 45, 334 A. 2d 839 (1975).
[93] 85 Wash. 2d 859, 540 P. 2d 882 (1975).

The argument was made in this case that allowing girls to compete with boys in contact sports such as football will result in boys being allowed to compete on girls' teams, thereby disrupting the girls' athletic programs. The court simply dismissed this as "opinion evidence" or "conjectural evidence" which cannot support a public policy contrary to the State ERA mandate.

One judge concurred reluctantly, "exclusively upon the basis that the result is dictated by the broad and mandatory language" of the State ERA. He questioned whether the people fully contemplated the result, but said that whether the people understood what they did or not, "in sweeping language they embedded the principle of the ERA in our constitution, and it is beyond the authority of this court to modify the people's will. So be it."

Title IX of the Federal Education Amendments of 1972[94] bans discrimination on account of sex in schools and colleges, but makes a number of statutory and regulatory exceptions to the absolute mandate. One of these exemptions is for the contact sports: boxing, wrestling, football, basketball, ice hockey, and rugby. If the Federal ERA is placed in the U.S. Constitution, it will wipe out all statutory and regulatory exceptions under *Marbury v. Madison*: "a law repugnant to the Constitution is void."[95]

Vorchheimer v. School District of Philadelphia[96] raises an interesting question about the tactics of proponents of the absolute standard for enforcement of ERA. The School District of Philadelphia maintains two sex-segregated public high schools as part of an otherwise coeducational, public school system, one called Philadelphia High School for Girls and the other Central High School (for boys). The trial court found as Fact #27 that "The courses offered at Girls are similar and of equal quality to those offered at Central." Susan Vorchheimer brought suit to force the boys' school to admit her.

The fatal defect in her suit, however, was that she brought it under the Equal Protection Clause of the Fourteenth Amendment and under the Equal Education Opportunities Act of 1974, neither of which requires the sex-integration of all schools. The court upheld Philadelphia's right to maintain two voluntary sex-segregated schools. The U.S. Supreme Court, dividing 4 to 4, let this decision stand.

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[94] Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 (1976).

[95] 1 Cranch 137 (1803).

[96] 430 U.S. 703 (1977); *see also* 532 F. 2d 880 (1976).

The mystery is why Susan Vorchheimer's lawyer and her ERA friends, who now complain about the decision all over the country, did not invoke the Pennsylvania State ERA, under which, using the absolute standard, she certainly would have won. Perhaps Miss Vorchheimer's friends were not yet ready to let the country know that the Equal Rights Amendment will make all single-sex schools unconstitutional – and thereby bring their long tradition of academic excellence to a close in the name of "equal rights."

In contrast to the absolute standard used by Pennsylvania under its State ERA, the courts in the equal-protection states continue to hand down decisions that allow a rational difference of treatment based on sex. Thus, in *Mercer v. North Forest Independent School District,*[97] the Texas Court of Civil Appeals held that the two-tiered approach used by the U.S. Supreme Court in equal protection cases is the proper method by which to judge the Texas so-called ERA. A boy had challenged the constitutionality of public school regulations which restricted the hair length of boys but not girls. The court stated: "We cannot agree with the Supreme Court of Washington that the ERA admits of no exceptions to its prohibition of sex discrimination."

It is clear that the non-ERA states and the equal-protection states will be able to maintain diversity in education and common-sense differences of treatment based on sex. The authentic ERA, State or Federal, will use a constitutional whip to force all schools, classes and school activities, athletics and regulations into the gender-free mold.

Effect on Criminal Law

The area of criminal law offers another example of how ERA is not needed to extend rights to women, but nullifies

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97. 538 S. W. 2d 201 (Tex. Civ. App. – Houston 14th Dist. 1976, writ ref'd n.r.e.).

existing laws that extend benefits to women.

Well before the Pennsylvania ERA was adopted, the Pennsylvania Supreme Court had decided that the Equal Protection Clause of the Fourteenth Amendment prohibits unreasonable sex discrimination. In *Commonwealth v. Daniel,*[98] the court nullified more severe sentences for women than for men convicted of crimes. So, without a State ERA, the courts already could and did nullify laws based on an unreasonable discrimination.

In *Commonwealth v. Butler,*[99] applying the State ERA, the Pennsylvania Supreme Court nullified the prohibition against minimum sentences for women convicted of crimes. If the statute involved here had been an unfair or unreasonable discrimination against women, it is obvious that the court would have been compelled to come to the same conclusion as it did in *Daniel*. However, the statute involved in *Butler* was not a discrimination against but a benefit to women convicted of crimes. It prohibited the imposition of minimum sentences for women offenders and allowed judges to set sentences which were lighter than the statute otherwise required, ranging up to a maximum sentence within the statutorily-prescribed maximum period.

As a result of the State ERA, female offenders have now acquired the new "right" to be required to serve a minimum statutory sentence just like male criminals, regardless of extenuating circumstances of the case.

In *Percival v. Philadelphia,*[100] the exemption of married women from application of writs of *capias ad respondendum* was nullified. In plain language, the exemption of married women from being thrown in jail to recover fines and penalties was declared unconstitutional under the Pennsylvania State ERA.

Effect on Insurance

The insurance industry is built on a distribution of risk among groups in which the average cost of the benefits can be statistically and reliably predicted. Everybody in the group pays a certain small premium so that no one in the group will be financially ruined by unforeseen and unwanted circumstances such as an untimely death, a major automobile accident, or a fire that destroys a home. If the insurance company could look into the future and know which individuals would have automobile accidents, it would obviously sell insurance only to those who would never need it. It is because we cannot predict which individuals will have the accidents or will die early that insurance costs are based on statistical averages of identifiable groups.

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[98] 430 Pa. 642, 243 A. 2d 400 (1968).

[99] 458 Pa. 289, 328 A. 2d 851 (1974).

[100] 12 Commw. Ct. 628, 317 A. 2d 667 (1974); *vacated on other grounds*, 464 Pa. 308, 346 A. 2d 754.

Among the facts on which insurance is based are those which prove differences based on sex. Statistical tables used by insurance companies provide such massive and reliable evidence of differences between the sexes that it is unnecessary to recite it here.

Among these differences are the facts, to cite just two examples, that, on the average, young men under age 25 have many more automobile accidents than young women and that women live longer than men. These statistical facts result in differentials in the prices paid by insureds. Young women under age 25 pay a much lower automobile accident insurance premium than young men under age 25. One recent study made by the industry shows that, if the insurance companies were required to charge males and females the same rate, young men would pay 8 percent less but young women would have to pay 29 percent more.[101]

The longer life span of women means that women pay lower life insurance premiums than men because they pay into the system for more years before they die. On the other hand, a pension plan which is designed to start paying an annuity at age 65 must be cost-equalized in one of two ways: by charging women more during the pay-in years before age 65, or by paying them a smaller benefit during the pay-out years after age 65.

Since insurance is regulated by state law, thus involving sufficient state action to bring it under any State or Federal ERA, what will be the effect of ERA on the insurance industry? No ERA State has answered this question yet, but the U.S. Supreme Court gave the probable answer in *Los Angeles Dept. of Water and Power v. Manhart.*[102]

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[101] Unpublished memorandum prepared by the National Association of Independent Insurers, Des Plaines, Ill. (1978).

In *Manhart*, the issue was whether the city of Los Angeles could charge women more for payments into a pension plan because they live more years after retirement than male employees. The city justified the differential on the grounds that (a) it was needed to equalize the take-home benefits after retirement, and (b) the differential was based on a factor "other than sex" which was protected by the so-called Bennett Amendment.[103] The legislative history of the Bennett Amendment, including the explicit statements of one of the sponsors, Senator Hubert Humphrey, showing the congressional intent to allow sex differentials based on longstanding differences of treatment in retirement determined by valid sex differences, was set forth in the case.

Nevertheless, the Court held that the result was the classification of males and females by sex, and that is "sex discrimination" which is prohibited by Title VII of the Civil Rights Act.[104] Conceding that "retroactive liability could be devastating for a pension fund," the Court denied retroactive relief but invalidated the differentials in payments into the pension plan.

Manhart applies only to the limited area of pensions governed by Title VII. All pensions, however, could be held subject to the State or Federal ERA whenever the challenge is brought. The results cannot help but be hurtful to women and costly to everyone. Since it is self-evident that insurance companies will have to cover their costs under any formula, the "marriage" of *Manhart* to ERA threatens the pocketbooks of all those who buy insurance.

Conclusion

The experience of the seventeen states which allegedly have State ERAs provides conclusive proof that ERA is not needed to accomplish any reasonable objective or any objective at all that is beneficial to women. All reasonable and beneficial changes in existing law can be made by the passage or repeal of statutes by Congress or the state legislatures or by the courts' use of the authority of the Equal Protection Clause of the Fourteenth Amendment. In case after case, the federal and state courts, both in ERA and non-ERA states, have used the Equal Protection Clause to invalidate obsolete, unjust discriminations on account of sex or to extend the law to apply to both sexes.

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[102] 435 U.S. 702 (1978).

[103] Equal Pay Act of 1963, 29 U.S.C. §206(d) (1976).

[104] Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000(e), et seq. (1976).

The speed with which Congress reversed the effect of the U.S. Supreme Court decision in *General Electric Co. v. Gilbert*[105] proves how viable and effective this process is. The Court held that it was not sex discrimination for a company disability plan to exclude disability wages to pregnant female employees, and within two years Congress by statute nullified that decision.

The experience of the State ERAs also shows conclusively that ERA is of no unique value whatsoever to women in the economic sphere. The coverage of federal statutes and executive orders is much broader than that of any ERA, and the remedies, through federal agencies and courts, are much more extensive. Those who believe that ERA means "equal pay for equal work" or that ERA will result in higher pay, more promotions, and greater job opportunities for women are living in a dream world. The State ERA experience proves that ERA provides no gain for working women.

Dothard v. Rawlinson[106] indicates one possible exception to this conclusion. *Dothard* was the case of a woman who applied for a job as a guard in an Alabama maximum security prison. After being denied the job, she sued charging sex discrimination under Title VII of the Civil Rights Act. The Court held that the facially neutral height and weight requirements were sex discriminatory because they excluded 41 percent of the female population and only one percent of the male population. But the Court did not give her the job because of the exception in the Title VII for a Bona Fide Occupational Qualification (BFOQ). In order to apply the BFOQ exception, however, the Court felt it necessary to describe in detail what is called the "jungle" conditions in Alabama prisons.

If ERA were adopted into the U.S. Constitution or if

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[105] 429 U.S. 125 (1976).
[106] 433 U.S. 321 (1977).

Alabama had had a State ERA, the absolute language and the absolute standard of either would have made the exception for a BFOQ constitutionally invalid. So, under a Federal or State ERA, a small woman might be able to get a job as a prison guard in a maximum security prison that she could not otherwise get.

What are the gains for women under State ERAs? The right of high school girls to play on the boys' football team and the right of men and women to go to heterosexual massage parlors. For that, wives have lost such longstanding rights as the rights to be supported; to have their hospital bills paid for; to be provided with food, clothing, shelter, and other necessaries; to have their minor children supported; and to have the presumption of custody of their children. Wives in EPA states (Equal Protection states) have not lost any of those rights, nor have wives in non-ERA states.

The experience of the State ERAs is more than adequate to convince us that ERA is unnecessary to achieve any beneficial goal for women or society, unreasonable in its absolute refusal to recognize obvious differences between the sexes, and unwanted in its potential to upset traditional objections to homosexual marriages, massage parlors, government-funded abortions, and other imaginative uses of the term "sex." Since there has been relatively little litigation under the State ERAs, we have so far seen only the tip of the iceberg of the harm ERA can do.

A Federal ERA would not only extend the harm already done in the State ERA states, but it would sex-neuterize all federal laws such as the military draft and combat duty. A Federal ERA would also compel the drastic changes mandated by Section 2 – the enforcement section which has the potential of causing such a massive shift of power from the states to the federal government that the changes accomplished by Section 1 would be dwarfed by comparison.

When the Equal Rights Amendment changes existing law, all its unique effects are unreasonable to society or harmful to women. ERA has no uniquely beneficial results.

THE EQUAL RIGHTS AMENDMENT: MYTHS AND REALITIES

BY SENATOR ORRIN G. HATCH (1983)

State ERA Laws

Sixteen States have their own version of equal rights amendments in the Constitution.[1] Under these provisions, there have been individual decisions which have borne out the concerns in this analysis, and individual decisions which have done the opposite.[2] What is the significance of State equal rights laws in understanding the likely impact of the ERA? Unfortunately, very little.

(1) Most of these State provisions use language which is far different from that of the ERA. This may make all the difference in the world since it is not the concept of equal rights that is in controversy but the specific language of the ERA. None of the State ERAs, for example, have the equivalent of section 2 of the Federal ERA.

(2) Much of the controversy about the ERA relates to the issue of its impact upon the States. Many of its difficulties arise because it would result in Washington D.C. not the States exercising decisionmaking. Thus, it may be appropriate for the States or localities to set forth some policies, but not for the Federal government (e.g. determining public school curriculums).

(3) The legislative history of the ERA is unique and is an integral part of its meaning. It is very much different from that of the State ERAs and will, thus, result in a different amendment. None of the State ERA's for example, were accompanied by a debate in which the various Ervin amendments were introduced and rejected.[3]

(4) There has been relatively little litigation thus far under the State ERA's, in part because the feminist community has been concerned about raising issues that can be used to the detriment of the Federal ERA.[4]

(5) State judges (who interpret State ERAs) are far more accountable to the people, because they are often popularly elected, than are Federal judges (who will interpret the Federal ERA), who serve lifetime appointments.

(6) Virtually all of the alleged legal gains attributable to State ERAs have also been realized under more traditional equal protection laws in States without their own ERAs. The male-female wage differential is actually *greater* in those States with their own ERAs.

(7) To the extent that there have been changes in law attributable to State ERAs, virtually all have worked to the clear detriment of *women* who have seen the elimination of existing legal *advantages*.[5]

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[1] See Lee, A Lawyer Looks at the Equal Rights Amendment (Brigham Young University Press, 1980) at 99–107.

[2] See Schlafly, The Effect of Equal Rights Amendments in State Constitutions, Policy Review, (Summer 1979) at 1–40.

[3] See *infra* at 66.

[4] See *supra* the text accompanying note 86.

[5] See, *e.g.*, *Henderson v. Henderson*, 458 Pa. 97, 327 A.2d 60 (1974) (right of wife to receive alimony during divorce proceedings); *Murray v. Murray*, 28 Wash. App. 187, 622 P.2d 1288 (1981) (maternal preference in child custody); *Rand v. Rand*, 379 A.2d 900 (Md., 1977) (paternal child support obligation in criminal bastardy cases).

APPENDIX

I. Additional Testimony

ON THE POLICY IMPLICATIONS OF FEMINIST THEORY FOR THE ERA

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Associate Professor of Political Science
Director, Institute for Political Philosophy and Policy Analysis

It is a great privilege to address this distinguished body on a topic of considerable importance to all Americans: The Equal Rights Amendment. My name is Jean Yarbrough. I am Associate Professor of Political Science and Director of the Institute for Political Philosophy and Policy Analysis at Loyola University of Chicago. I teach political philosophy and have published in American political thought and institutions. I have written several articles on the theory and practice of federalism. Also of interest to this committee, I have written an article on "Women in the Military" to be published in the Naval War College Review. I have taught full time since receiving my doctoral degree ten years ago, returning to work shortly after the birth of both of my two children, now aged five years and twenty months, respectively. For two years, after the birth of my first child, I was sole support of my family while my husband returned to graduate school. I have retained my maiden name professionally and socially and, at times, have maintained a legal residence in a state different from my husband. I am a registered Democrat. I give you this information because I believe that opposition to the ERA is broader than popularly depicted. I have come here today to share with you some of the reasons why I believe the Equal Rights Amendment is the wrong way to end discrimination and secure the rights of women.

Unlike those who have come before me to testify, I shall not dwell on the legal questions which the ERA raises, although they are numerous. Rather, I shall briefly survey feminist theory in an effort to draw out some important policy implications. Let me explain why with this story. Not long ago I attended a lecture at the University of Chicago by Ambassador Jeane Kirkpatrick on Alexis de Tocqueville's Democracy in America and the conduct of democratic foreign policy. During the question period, Ambassador Kirkpatrick was accused of reflecting the views of the Reagan Administration. Mrs. Kirkpatrick replied with some amusement that the administration most assuredly did *not* consider Tocqueville in formulating its foreign policy.

With all due respect to this eminent committee, I assume that most of its members have not widely read feminist theory in considering whether to support or oppose the ERA. Yet I believe that some familiarity with the literature will be helpful to legislators debating the Amendment for two reasons: first, it affords a clear picture of what the most vociferous supporters of the Amendment think the ERA will do; second, it suggests what legal battles are likely, since feminists will certainly press their views in the courts. This latter point is especially important given the vagueness of the provision as it is currently written and the persistent refusal of Congress to attach any exceptions to the amendment during its legislative history. Under these circumstances, the meaning of the ERA is likely to be supplied by the Courts. If the Court is faithful to the words of the Amendment and to the intentions of the Framers, it will have no basis to resist the feminist understanding of equality of rights, an understanding which goes far beyond the issues of role equity, such as equal pay for equal work, equal employment opportunities, equal credit, etc., to a full scale demand for *role change*. As Joyce Gelb and Marian Lief Palley explain in their highly acclaimed study, *Women and Public Policies*:

> . . . role change issues appear to produce change in the dependent female role of wife, mother and homemaker, holding out the potential of greater sexual freedom and independence in a variety of contexts. The latter issues are fraught with greater pitfalls, including perceived threats to existing values, in turn creating visible and often powerful opposition. (pp. 7-8)

Ultimately, I believe, feminists seek change to establish an androgynous society in which all sex distinctions are impermissible. You have heard testimony from both supporters and opponents of the ERA that it would require the full integration of women in the military, including combat. But the androgynous ideal of most feminist writers challenges our social and domestic relations as well.

In what follows I will survey some of the most important feminist thinkers of the last twenty years, drawing out the policy implications of their position. I will conclude with a brief discussion of the most recent "third stage" feminist literature to suggest that there is now a small but significant movement among feminists toward a recognition of the importance of sex differences. "Third stage feminism" as Prof. Benjamin R. Barber calls it, moves beyond strident androgyny (first stage) and apologetic reaction (second stage) to the proud assertion that women are "different, but equal." If these feminists are correct, the reform of our political and domestic institutions will require a far more subtle approach than the Equal Rights Amendment.

I

Contemporary American feminism began some twenty odd years ago with the publication of Betty Friedan's The Feminine Mystique (1963). Friedan likened the home to a "comfortable concentration camp," and argued that women could only "grow and fulfill their potentialities as human beings" outside the home. The years that followed produced a torrent of feminist literature, exploring the causes of women's oppression. Their arguments can be summed up in the following propositions:

1. The family, at least as historically constituted, is the main source of women's oppression, and must be radically altered if not eliminated altogether. Thus, in her influential study, Women's Estate (1971), Juliet Mitchell sees the family as the main source of owmen's oppression and neurosis:

> What does our oppression within the family do to us as women? It produces a tendency to small-mindedness, petty jealousy, irrational emotionality and random violence, dependency, competitive selfishness, and conservatism.

While Mitchell focuses on how the family makes women neurotic, Nancy Chodorow, whose 1978 book The Reproduction of Mothering, was awarded the Jessie Bernard Prize by the American Sociological Association, argues that mothering by women is psychologically destructive.

> . . . the very fact of being mothered by a woman generates in men conflicts over masculinity, a psychology of male dominance, and a need to be superior to women (p. 214).

The male desire to dominate women, then, is rooted in the mother-son relationship. Until men share with women the responsibility for child-rearing, there will be no end to this oppressive cycle. Dorothy Dinnerstein, whose book The Mermaid and the Minotaur makes much the same point, has popularized these views in Ms. magazine.

To the extent that radical feminists like Pauline Bart, Adrienne Rich (Of Women Born), and Judith Arcana (Our Mother's Daughters), reject this "mother-blaming," they suggest as an alternative to the heterosexual biological family, "Woman bonding" (Bart, in Mothering, ed. Joyce Treblicott, p. 149).

2. Feminists also see conventional marriage as rape, exploitation, and oppression. Kate Millett's best seller, Sexual Politics (1970), argues that the relations between the sexes are not, as women have been taught to believe, based on the private relationship of love, but are in fact power relationships supporting patriarchal dominance. The ideology of romantic love "obscures the realities of female status and the burden of economic dependency" (p. 37). Feminist writer Vivian Gornick told a reporter at the University of Illinois, where she was recently a visiting professor that

> Being a housewife is an illegitimate profession. The choice to serve and be protected and plan towards being a family-maker is a choice that shouldn't be. The heart of radical feminism is to change that. . . . ERA says to every woman, 'you must be responsible and grow up' (cited in Carol Felsenthal, 'How Feminists Failed,' Chicago Magazine, June 1982, p. 139).

Kathrin Perutz summs it up in the title of her book, Marriage is Hell.

3. Marriage is hell because marriage produces children and children are slavery. Patriarchal societies oppress women because they assign women exclusive responsibility for childrearing, based on a sexual division of labor. Thus, the noted French feminist, Simone de Beauvoir, recently warned,

> I think a woman must not fall into the trap of children and marriage. Even if a woman wants to have children, she must think very hard about the conditions in which she will have to bring them up, because childbearing, at the moment is real slavery. (Cited in Mothering, p. 315).

In the view of the editors of No More Fun and Games, a woman who chooses to become a mother signifies that she has not "achieved sufficient maturity and autonomy and is seeking a hopeless fulfillment through neurotic channels." (Cited in Jean Bethke Elshtain, "Feminism, Family and Community," Dissent, Fall, 1982, p. 443).

In her article, "Motherhood: The Annihilation of Women," Jeffner Allen goes still further, condemning what she sees as the genuine lack of choice women have in patriarchal societies.

> Women are mothers because within patriarchy women have no choice except motherhood. Without the institution of motherhood women could and would live otherwise. . . . Until patriarchy no longer exists, all females, as historical beings, must resist, rebel against, and avoid producing for the sake of men. Motherhood is not a matter of a woman's psychological or moral character. As an ideology by which men mark females as women, motherhood has nothing to do with a woman's selfishness or sacrifice, nurturance or non-violence. Motherhood has everything to do with a history in which women remain powerless by reproducing the world of men and with a present in which women are expected to do the same (Mothering, p. 315).

Accordingly, she advocates a "philosophy of evacuation," or "the collective removal of ourselves from all forms of mothering" (p. 315).

In a more popular vein Ellen Peck, in her book The Baby Trap, blames children for the loss of romance, idealism, and personal freedom. Jill Johnston, author of Lesbian Nation, describes her own experience with motherhood as a "drastic drag."

4. Since women's liberation depends upon the emancipation of women from child-rearing and child bearing, feminism is committed to children's liberation and abortion. According to Shulamith Firestone, childhood is a myth to legitimate existing power relations: "Most of child-rearing . . . has to do with the maintaining of power relations, forced internalization of family values, and many other ego concerns that war with the happiness of the individual child"(Dialectic of Sex, pp. 221-222). There is then no tension with women's liberation and the needs of children. "By now people have forgotten what history has proven: that 'raising' a child is tantamount to retarding his development. The best way to raise a child is to LAY OFF" (p. 90). Kate Millett resolves this conflict in a different way: "The care of children is infinitely better left to the best trained practitioners. . . . The family, as that term is presently understood, must go" (in Felsenthal, p. 139).

Similarly, the liberation of women from child bearing requires the unqualified right to abortion. As Lucinda Cisler argues in "Unfinished Business: Birth Control and Women's Liberation," "Without the full capacity to limit her own reproduction, a woman's other 'freedoms' are tantalizing mockeries that cannot be exercised" (in Robin Morgan, ed., Sisterhood is Powerful, pp. 274-75; emph. added). Elsewhere in the same article she argues that

> . . . abortion is a woman's right and that no one can veto her decision and compel her to bear a child against her will. All the excellent supporting reasons--improved health, lower birth and death rates, freer medical practice, the separation of church and state, happier families, sexual privacy, lower welfare expenditures--are only embroidery on the basic fabric: woman's right to limit her own reproduction.
>
> It is this rationale that the new woman's movement has done so much to bring to the fore. Those who caution us to play down the woman's rights argument are only trying to put off the inevitable day when society must face and eradicate the misogynistic roots of the present situation (p. 309).

5. The fifth and final proposition I want to discuss is the feminist hostility to nature, and their belief that all gender roles, including heterosexuality, are socially conditioned. Feminists are nearly unanimous in their belief that the family and the gender differentiations within it are simply conventional. By this I mean they see no natural basis for these roles; these roles result from complex social relations, with feminists differing in the weight they assign to patriarchy, capitalism, ideology, and early psycho-social experiences.

Although they concede the obvious, that only men can beget and women bear children, they consider this fact irrelevant. As Juliet Mitchell puts it, "Biological differences between men and women obviously exist but it is not these that are the concern of feminists" ("Women and Equality," p. 379, in Mitchell and Ann Oakley, eds., *The Rights and Wrongs of Women*, 1977). Yet, although feminists consider these differences insignificant, they recognize the powerful role they have played in the history of women's oppression. Reproductive roles, according to Lucinda Cisler, "have been used to rationalize all other ascribed differences between men and women and to justify all the oppression women have suffered" ("Unfinished Business," p. 275).

There are, however, a few dissenters from this view. Thinkers like Shulamith Firestone and Rudolf Shaffer believe that that nature is the enemy. But they anticipate scientific advances which will free women from the reproductive process itself. Thus Shaffer writes

> . . . biologists give us reason to think that even the process of birth, in its natural form is not sacrosanct--that it may eventually be possible to grow a foetus not in a womb, but in an artificial environment from which it is delivered in due course. Thus all the original reasons for confining child care to women are disappearing; MOTHER NEED NOT BE A WOMAN! (in Shaffer, *Mothering*, pp. 111-112))

Since Firestone and Shaffer believe that science will eventually make possible the complete emancipation of women from their nature, they believe that women will be free to choose their "life styles." At this point, the different strands of feminism converge again. The good society feminists envision for men and women is based on the principle of androgyny, that is, a society in which all "persons" share in masculine and feminine traits and roles.. The androgynous society extends not only to the work place, where women should be free to enter every occupation, including guards in all-male prisons and military combat, (the only exception being the extremely narrow "bfoq"), but also to the family. Here the psychological theories of Chodorow and Dinnerstein, criticizing the role of women as mothers, loom large. As Diane Ehrensaft writes in support of "When Women and Men Mother,"

> . . . feminist theory . . . has stressed that gender differentiation and sex oppression will exist as long as women continue to be totally responsible for mothering. The call for shared parenting by men and women moves those of us already involved in attempting such a reorganization of family life to reflect and analyze its potential and actual effects on the reorganization of gender and childrearing structures (*Mothering*. p. 42).

Similarly, philosopher Virginia Held, drawing on the same sources, warns that ". . . if it is true that our social practice of making mothers but not fathers the primary caretakers of small children forms the male personality into one in which the inclination toward combat is overdeveloped and the capacity to feel for others is stunted, our survival may depend on a reorganization of parenting" (Mothering, p. 7).

Sara Ruddick, in her influential essay, "Maternal Thinking," sees a different benefit to men's sharing equally in the rearing of children. Instead of praising this arrangement because it spells the end of woman's exclusive role as mother, she believes it is valuable because

> On that day there will be no more 'fathers,' no more people of either sex who have the power over their children's lives and moral authority in their children's world, though they do not do the work of attentive love. There will be mothers of both sexes who live out a transformed maternal thought in communities that share parental care (in Mothering, p. 227; emphasis added).

Lest this recommendation be construed as reinforcing heterosexuality, even in more fluid patterns, feminists like Ehrensaft and Ruddick are quick to admit that this family model is "not the ultimate solution for all people. Parenting by women alone, by men alone, in extended families, in lesbian and gay couples, in communal situations within neighborhood networks--all are models to be explored and understood" (Mothering, p. 42; also, pp. 226-27).

Before proceeding to a discussion of some policy implications, let me summarize the main points so far. In the last twenty years, feminist theory has generally held:

(1) The nuclear family with its supposed natural division of labor is oppressive to women and must be overthrown or radically altered;

(2) Marriage confines and exploits women.

(3) Children are a form of slavery because they tie women to the home and restrict their opportunities for self actualization.

(4) The liberation of women requires the full right to control the reproductive process through contraception and abortion as well as the liberation of children from their families.

(5) Sex dofferences are the source of women's oppression and are incompatible with human equality. The just society must aim at androgyny, or the annihilation of gender differentiation based on sex.

Although I cannot discuss all the policy implications of these arguments, I would like to highlight a few. First, the ERA would drastically alter federal state relations. Since the ERA involves issues which have traditionally been within the jurisdiction of the states, most importantly, marriage, divorce , child custody, domicile, parental obligations, adoption, and other laws relating to the family, states would be required to make all necessary changes to insure that "equality of rights" was not denied or abridged "on account of sex." And, if the states fail to do so, Section Two empowers Congress to enforce the amendment. Although it is true that this enforcement power is included in other civil rights amendments, Congress is here empowered to enforce a right which is not specifically identified. Moreover, the areas potentially affected by the ERA are vast, touching as they do on domestic and family law, so that the loss of power and autonomy to the states would be enormous. As a scholar who has studied the theory and practice of federalism, I believe this reduction in state power would be harmful for three reasons:

(1) It ignores the tremendous diversity of the fifty states, imposing a national standard on political cultures as varied as Utah and Nevada, New York and Texas, to name a few obvious examples.

(2) It denies the states the opportunity to experiment with different notions of sexual equality, just as it denies the nation the chance to avoid the mistakes and to learn from the successes of these social experiments.

(3) It disturbs the distribution of powers between the states and the federal government essential to the preservation of liberty.

Thus, although I welcome efforts to end discrimination against women, I believe that reform measures should respect the federal character of the Constitution.

Turning now to substantive policy areas, my reading of feminist theory suggests that there would be wholesale challenges to family law, including

(1) a redefinition of what legally constitutes a family and who can be married. Lesbians and radical feminists would undoubtedly join with gay rights activists to challenge present statutes discriminating against homosexuals "on account of sex." Indeed, they have done so already. At the 1977 International Women's Year Conference held in Houston, delegates endorsed a host of controversial planks, including gay rights, abortion, and government sponsored day care (in Felsenthal, p. 140).

(2) A redefinition of the obligations of parents within the household which would eliminate pernicious gender distinctions. In keeping with Chodorow's suggestion that mothering by women alone is psychologically destructive to children, Virginia Held criticizes existing family law which, "in its cha-

racteristically obtuse way" enshrines a sexist division of responsibilities.

> As summarized in a recent legal textbook, 'the husband is to provide the family with food, clothing, shelter, and as many of the amenities of life as he can manage. . . . The wife is to be mistress of the household, maintaining the home with the resources furnished by the husband, and caring for the children (in Mothering, p. 8).

Held hopes that "if the federal Equal Rights Amendment is adopted, it may bring about significant changes in the law" (p. 8). Nor can such a view be dismissed as the silly, but essentially harmless opinion of an isolated radical. For Judge Ruth Bader Ginsburg, co-author of the Civil Rights Commission report on sex bias in the U.S. Code (1978) makes much the same point: "The concept of the bread-winning husband . . . must be eliminated from the (U.S.) Code."

(3) An expansion of the rights of children.

(4) An expansion of sex discrimination to include inflexible work hours, career patterns, and lack of adequate day care centers, all of which adversely affect equality of rights for women.

In terms of social policy the ERA would certainly be invoked to require publicly funded abortions. In this regard, the decision of the Commonwealth Court of Pennsylvania is instructive. In March 1984, Pennsylvania became the first state in the Union to rule that the State's ERA which is nearly identical to the proposed federal ERA, was "sufficient in and of itself to invalidate the statutes" restricting Medicaid funding of elective abortions to cases of rape or incest which were promptly reported, or when the life of the mother was endangered.

Finally, in an area which has frequently been an embarrassment to feminists, the ERA would require the full integration of women into the military, including combat. Support for the right of women to participate equally in the military is a dilemma because many feminists believe there is a strong connection between feminism and pacifism, and many of its present leaders are veterans of the anti-war, anti-draft protests of the sixties and early seventies. Sara Ruddick, in an important essay, "Preservative Love and Military Destruction," explains the connection:

> . . . the conventional and symbolic association between women and peace has a real basis in maternal practice. Out of maternal practice a distinctive kind of thinking arises that is incompatible with military strategy but consonant with pacifist commitment to non-violence (Mothering, p. 233).

This ambiguity between feminism and women's rights to participate equally in the military can be seen in the policy of the National Organization for Women. While denouncing President Carter's reinstitution of registration "because it is a response which stimulates an environment of preparation for war. . . . War is senseless," its leaders nevertheless criticized the Supreme Court's decision in Rostker v. Goldberg (1981) upholding male-only registration as a denial of equal rights which the federal ERA would certainly reverse.

To sum up: the main thrust of feminist theory over the last twenty years seeks more than the end of discrimination against women. As Gloria Steinem succinctly put it: "We're talking about a revolution, not just reform." Now as practical politicians you may object that these radicals constitute only a tiny minority. Most Americans who support the ERA do so because they see it as a relatively harmless measure which seeks to extend fairly uncontroversial reform legislation. Why then is it necessary to take radical feminist thinkers seriously? Because a feminist writer Benjamin R. Barber has written: "They reflect a thrust that can affect even the most moderate programs for change. War permits no neutrals. Once nature is regarded as the foe, moderation can look treasonous" (Liberating Feminism, p. 35). The ERA may seem innocuous but, if enacted, it is likely to shift the struggle for women's rights in a more radical direction for the following reasons:

(1) The ERA is extremely vague and open-ended. You have heard testimony of Walter Berns stating that "the ERA, if adopted, would be the only provision in the Constitution bestowing or protecting a right without identifying that right.

(2) The vagueness of the Amendment insures that the courts will become the final interpreter of its meaning. Yet, if the courts look at the phrase "equality of rights" and then consider the legislative history of the Amendment, where Congress has refused to permit "common sense" exceptions, such as barring women from combat, they will be bound to conclude that they must give an absolute interpretation which permits no exceptions. If, on the other hand, the Court does impose limitations on the Amendment's meaning, it will do so by reading its own views into the Amendment, a procedure which raises altogether different problems.

(3) Unlike the political process, which tends toward moderation because it must appeal to a majority of legislators, representing diverse constituents, the judicial branch is under much less restraint. Minorities have just as good a chance of prevailing in the courts as majorities. And in this case, probably better, since the meaning of the amendment appears to permit no exception.

(4) More "politic" supporters of the ERA, eager to give the impression that the Amendment attempts nothing more than modest reform, have claimed that the amendment is not intended to challenge controversial policies such as publicly funded abortions, or benign segregation, such as single sex schools or single sex associations like the Girl Scouts and the Boy Scouts. Thus, for example, in 1982, the Pennsylvania Commission for Women flatly stated that "abortion is not and should not be considered an ERA issue." But that assurance did not bind the Pennsylvania Court. Elsewhere in the country, ERAs are also being invoked on behalf of precisely those issues its supporters initially disclaimed.

(5) Once the courts begin to expound the meaning of the Amendment, they will be bound by the logic of their own precedents to an ever broader construction. And more radical feminists will use each victory to press for additional rights they have no hope of winning through the political process.

Given these difficulties, why are we debating the ERA again? In large part, I think it is because opposition to it is so easy to brand as sexist, reactionary, and right wing, while the alternatives are so difficult to pursue and explain. As Alexis de Tocqueville rightly observed in Democracy in America: "A proposition must be plain, to be adopted by the understanding of a people A false notion which is clear and precise will always have more power in the world than a true principle which is obscure or involved" (I:166).

Yet, the simplicity of the ERA is both its strength and its weak ness. As the Boston Globe pointed out in an editorial in 1975. Under the Amendment "equality is absolute, total, unalterable, for all times. What is good or bad for one sex is equally good or bad for the other. And lawmakers would be forbidden from every distinguishing between the two on any matter (in Felsenthal, p. 143).

II

Just at the time supporters of the ERA were preparing to reintroduce the Amendment into Congress to begin the ratification process all over again, a new group of feminists began to challenge the androgynous assumptions of the feminist movement. Reviewing some of the most important of these new works in the New Republic last summer, Benjamin R. Barber observed that this "third stage" feminism seemed

> to be pushing toward a full demystification of both the feminine and the feminist mystiques, in favor of a realistic appreciation of sexual differences, the constraints they place upon us, and the plural virtues they make possible ("Beyond the Feminist Mystique," The New Republic, July 11, 1983, p. 32).

According to Barber, "the striking new premises" of "third stage feminism" include: "1. Women and men are biologically distinct in a way which, although not strictly causal or deterministic, powerfully conditions moral development and social institutions, and which cannot be theorized away in the name of abstract androgyny." Thus, for example Carol Gilligan, begins her book In A Different Voice: Psychological Theory and Women's Development (1982) with the observation: "At a time when efforts are being made to eradicate discrimination between the sexes in the search for social equality and justice, the differences between the sexes are being rediscovered in the social sciences" (p. 6). For Gilligan, these differences include the discovery that women's moral development proceeds differently and arrives at a different point from that of men. As a result of their early childhood experiences with their mothers, women tend to develop a morality of responsibility, which stresses connectedness, care, and the preserving of relationships. As a result of different experiences, men tend toward a morality of rights which stresses individualism, autonomy, and independence. But, and here is where the feminist point of view comes in, women are not inferior to men in moral development, only different. A comprehensive theory of moral development must recognize that "women bring to the life cycle a different point of view and order human experiences in terms of different priorities" (p. 22) and accord these differences equal consideration.

Whereas Gilligan focuses on moral development, Carol McMillan, in her book Women, Reason and Nature (1982), examines the faculty of reason. McMillan rejects the stereotypical view of women as emotional creatures, incapable of reason. She argues that this prejudice is shared by sexists and feminists alike, though for different reasons. Sexists believe that women are "naturally" irrational; feminists believe their confinement in the home conditions them to such behavior. By contrast she argues that there is a specifically feminine form of rationality, which she calls intuitive knowledge. Intuitive knowledge is particular rather than abstract and universal; it is acquired through experience rather than book learning. Intuitive reasoning emerges from traditional feminine activities, especially "procreation and childrearing" (p. 56), and is uniquely suited to these activities.

(2) The second premise of the new feminists is that "sexual differences, neither wholly inevitable, nor wholly eradicable, are in themselves beneficent and life-enriching; liberation can be better won through their cultivation than

their negation." For feminists like Gilligan, McMillan, Barber and even Betty Friedan in her more recent work, this means a theoretical appreciation of the distinctive feminine moral and rational contributions to human civilization and of distinctive feminine activities. There is in each of these works a reaffirmation of woman's roles as "nurturer, caretaker, and helpmate" (Gilligan, p. 17).

(3) Closely connected with this recognition of sexual differences is the rejection of androgyny as the standard for the good society. Not only does androgyny produce a stifling uniformity, but "it turns out to be rationalization for dominant male paradigmns disguised as . . . human archetypes."

Thus, Gilligan criticizes earlier theories of moral development, which purported to investigate human moral development, but took masculine development as the standard, and judged women inferior. Similarly, McMillan defends a specially feminine kind of reasoning. She argues that the intuitive knowledge of women is not irrational, but only appears this way when more masculine forms of reasoning wrongly become the paradigm of rational thinking for both sexes.

(4) The new feminism attempts to portray the feminine condition in a more positive way and, in so doing to reconcile the tension between feminism and the family. As Ben Barber puts it: "The special relationship that femininity affords women to generativity, nurturing, and affection, endows them with a unique appreciation of (and responsibility for) the ethics of caring and of affiliation indispensable to civilization." This is in fact the central focus of Gilligan's work on moral development and McMillan's examination of reason. Increasingly, these arguments are finding their way into feminist thinking. Thus, Jean Bethke Elshtain, in a much discussed essay in Dissent,"Feminism, Family, and Community" (Fall, 1982), chides radical feminists of the seventies for their attacks on the family. In contrast to earlier feminist psychologists, who viewed motherhood as essentially neurotic, Elshtain looks upon the traditional concerns of women with "children, friends, and community" sympathetically, though the community she has in mind is not your average suburb. She is intrigued with Gilligan's suggestion of a distinctive moral voice, "emphasizing concern and responsibility for others." If Gilligan is right, then "feminists should be among the first to preserve the sphere that makes this morality possible and to determine how best to extend its imperatives to a less-than-humane world" (p. 447).

Sara Ruddick maes a similar point in her essay "Maternal Thinking," in which she explores the maternal concern with preservation, growth, and love and seeks to join them to a feminist politics.

(5) The final, and most important premise for our purposes, is:

> Given that sexual differences are valuable (rather than indelible), the quest for justice in social relations cannot be a search for perfect symmetry. Instead, ways must be found to preserve (or create) political and economic equality in the face of differing social roles, distinctive gender needs, and contrasting, if (ideally) complementary approaches to moral development and reasoning.

Clearly, this is a more difficult task, for it requires making subtle and controversial distinctions based on sexual differences. Take two provocative issues: If Gilligan is right that women develop a morality of responsibility, shouldn't public policy take this distinctive moral point of view into account when devating whether to allow women in combat? If McMillan is right that the relationship between mothers and children is not wholly conditioned, should an "authentic feminism" begin by taking seriously "the woman's role in the home," rather than the right of women to pursue careers? (McMillan, p. 104). Feminists themselves do not agree on these and other issues and they are right to fear that such distinctions may be used to rationalize sex discrimination. Nevertheless, the premise underlying the first stage of feminist theory, that every distinction constitutes discrimination, is now being called into question --not by sexists, but by a new generation of feminists. It would be ironic if Congress were to accept the androgynous ideal which the ERA represents at precisely the moment it was being challenged by feminists.

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The ERA and the Earnings Gap Between Men and Women

Michael and Judith Finn*

Hearings on the Equal Rights Amendment
Committee on the Judiciary, U.S. Senate, September, 1984

Women in the labor force earn about two-thirds as much as men. The existence of this earnings gap is often cited as evidence of widespread sex discrimination in employment. Some believe that the passage of the Equal Rights Amendment to the U.S. Constitution would change this, or at least reduce the size of the male/female earnings differential. The testimony which follows is devoted to the data and research findings on this issue.

It is argued that the ERA would reduce the male/female earnings differential by reducing sex discrimination against women in the labor market. Of course, for ERA to even potentially have such an effect, two conditions would have to presently exist: (1) the current male/female earnings differential would have to be the result of labor market discrimination, at least in part, and, (2) ERA would have to add something significant to our present tools for combatting sex discrimination in the labor market.

Our focus here is on the first of these conditions, whether the earnings gap results from discrimination. We find the best case for this view to be very weak, because there is no direct evidence that sex discrimination in the labor market is responsible for any significant part of the male/female earnings difference. It is true that some have examined the available data and studies and have concluded that sex discrimination must account for part of the male/female pay gap. We have examined this evidence and concluded that alternative explanations for the earnings gap are much more plausible.

The Earnings Gap

Nearly everyone who cares about this issue knows that women earn about $0.59 for each dollar earned by men. This commonly cited statistic is derived by comparing the annual earnings of "full-time" wage and salary workers. The $0.59 has not changed much but it was up to $0.60 by the time of the 1980 Census and by 1982 was up further to $0.62 [1]. But note that "full-time" does not mean the same thing for men and women. On average, male full-time workers work more hours than female full-time workers. Men are more likely to hold two jobs and tend also to work longer hours in their principal job. There is no readily

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cited government statistic which allows us to compare male vs. female earnings per hour worked but several economists have estimated that women earn about $0.70 per dollar earned by men when an adjustment for hours worked is made.[2].

The earnings gap between men and women was fairly constant prior to 1979 but has been declining since then. This is shown in Table 1.

Table 1

Median Usual Weekly Earnings of Men and Women, Full-time Wage and Salary Workers, 1979-1983

Year	Female-to Male-Ratio
1979	.63
1980	.63
1981	.65
1982	.65
1983	.66

Source: Monthly Labor Review, June 1984, p.26

Table 1 shows the male/female earnings ratio, using a slightly different measure of earnings available from the U.S. Department of Labor. The "usual weekly earnings" shows a smaller gap between men and women (than does annual earnings) because it does not count second jobs. The increase in the ratio of women's to men's earnings, from .63 in 1979 to .66 in 1983 is enough to establish a new trend because we know this ratio moved in a narrow band between .61 and .63 during the preceeding decade. Several factors contribute to the narrowing of this earnings gap. For more than a decade women have been getting education and work experience which is more like that of men. For example, in 1970 women earned 43 percent of the Bachelors degrees awarded. Since then the trend has been rising. By 1981, for the first time ever, women earned half of all Bachelors degrees awarded in the U.S.[3] We would probably have seen an effect on the earnings ratio sooner but for one significant fact: the rising proportion of women in the workforce has meant an influx of relatively inexperienced women, and inexperienced persons earn less. In the future we can expect greater parity between men and women with respect to work experience, and this will tend to produce greater equality in the male/female earnings ratio.

Causes of the Earnings Gap

The [illegible] proponents assert that the pay gap is evidence of sex discrimination in the labor market. The more sophisticated among them acknowledge that there are some legitimate reasons for existing pay differentials but add that studies have shown that a significant share, probably more than half of the existing [illegible] is due to sex discrimination in the labor market.

The most sophisticated evidence introduced into the debate by proponents of ERA has been the reference to research studies which examine the causes of the male/female earnings gap in the U.S. as a whole. For example, Professor Francine Blau testified before the House Judiciary Committee on Sept. 14, 1983 stating that,

> "A growing body of research into the causes of the male-female pay gap supports the view that discrimination against women in the labor market accounts for a significant share of the differential--probably over half. That is, over half of the pay differential between men and women cannot be explained by sex differences in qualifications."[4]

Professor Blau is referring to a body of economic research which tries to explain earnings differences in terms of formal schooling, work history, and measures of "labor force attachment." That part of the earnings gap which is not associated with differences between men and women in these factors is sometimes interpreted as a measure of discrimination.

However, all careful researchers have qualified their interpretations of the "unexplained residual." They recognize that it could be due to a variety of factors other than sex discrimination in the labor market. Those, like Professor Blau, who interpret the "unexplained residual" as a measure of discrimination have been severely critized in the economics literature. Because this point seems to be central to the debate over the proposed ERA, we would like to briefly quote some of these dissenting views.

Dr. June O'Neill, Director of the Program of Policy Research on Women and Families at the Urban Institute, has stated that,

> "Among those studies...the central finding has been that about half of the gap is accounted for by a few key variables: schooling, years of work experience, years in the labor force, and job tenure. The unexplained residual, however, cannot be taken as a measure of discrimination. It is more correctly described as a measure of our ignorance."[5]

Dr. Walter Williams:

> "The time is long past when an analysis can be considered methodologically sound that considers only what can be (easily) measured, and attributes the remaining differential to one such variable: discrimination."[6]

Another economist, Dr. Nancy Barrett, has stated:

> "I have always been uneasy about studies that treat discrimination as an unexplained residual,...I think it is extremely dangerous to let this research be disseminated outside of econometric conferences with the label 'discrimination' applied to the unexplained residual--we must, at least, be sure that we have accounted for all the factors that might have been responsible for changes in the sex earnings gap before we draw conclusions about trends in discrimination."[7]

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Dr. Jacob Mincer:

> "Although it may be 'traditional', ... to measure discrimination by the residual--after various other factors have been netted out--I think a more humble attitude is to think of the residual as a measure of our ignorance..."[8]

Dr. Brian Chiplin reviews the evidence and concludes:

> "Thus the current empirical evidence leaves a lot to be desired; many of us might believe that sex discrimination exists, but do we know?" [9]

Dr. Cotton Mather Lindsey:

> "The list of factors producing differentials in productivity and therefore wages, but which cannot be controlled for statistically, is far longer and potentially far more important than the short list currently entered in any computer."[10]

Another economist, Dr. Solomon Polachek:

> "...the traditional method of examining discrimination as a gap in wages is clearly biased...The results of this study indicate that...a conclusion of nondiscrimination is warranted."[11]

Dr. Harriet Zellner summed up the problem with the evidence that has been presented in support of the discrimination hypothesis. Unlike most economists she finds a way to say what she means using everyday language:

> "to ...test for the existence of discrimination in the labor market by determining whether there is any wage differential left after controlling for all relevant characteristics is somewhat like trying to discover whether you left your watch in the kitchen by looking for it everywhere else first. It would be more efficient to look in the kitchen."[12]

Clearly, the plain fact is that the hypothesis that the earnings gap is due to discrimination is just that, an unproven hypothesis. There is far more support for this view that I can review here, but I am citing it for the record.[13] The point here is not only that this method is seriously flawed, but that those who claim to have measured the extent of discrimination have only the existence of the "residual" upon which to base this claim.

Further, the studies which have used statistical analysis to try to isolate discrimination using the "residual" method have nearly all focused on the people in our labor force who work for wages or salary. They usually do not include the nearly 10 million American workers who are self-employed. This is understandable: if one is looking for discrimination in employment it makes sense to focus on those who work for others and have their earnings determined by their employers. However, this has caused us to ignore an important fact: the earnings gap is just as large among the self-employed as it is among wage and salary workers! See Table 2 below.

Table 2

Ratio of Female/Male Earnings for Year-round, Full-time Workers in 1982, by Occupation and Class of Worker

Occupation	Wage and Salary Workers	Self-employed
Managerial and Professional	.63	.42
Technical, sales, and administrative support	.59	.47
Service	.63	.44
Precision production, craft and repair	.65	.54
Operator, fabricator, laborer	.64	.49
Farming, forestry, fishing	.70	.04
Total, all occupations	.62	.46

Source: Eugene H. Becker, "Self-employed workers: an update to 1983", Monthly Labor Review, , July 1984, p.18

In every occupation group the earnings gap between men and women is greater among the self-employed than it is among wage and salary workers. This suggests that there is something other than employer discrimination which is causing the earnings gap. We can anticipate that the advocates of greater federal regulation of the economy will assert that the self-employed suffer discrimination too. If you held a hearing on this, you would undoubtedly hear that self-employed women suffer discrimination or lack the "connections" that self-employed men have. However, studies do not support such a claim.

Physicians are one of several occupations dominated by self-employed persons. This is also an occupation with a well-publicized and well-researched wage gap between men and women. Studies of this occupation are better than those which were conducted for the economy as a whole (and referred to above), because the studies of physicians earnings have measures of physicians actual output (eg. number patients seen). This is very important because women physicans not only work fewer hours than male physicians but they see fewer patients per hour worked. They are not discriminated against by referring doctors or patients, as they charge prices as high as their male counterparts and they also have waiting lists at least as long as the men's. When the facts about their lower productivity are taken into account, researchers conclude that the earnings gap between men and women physicians is completely explainable by factors other than discrimination.[14] The research on physicians is relevant to our discussion in two respects: first, it indicates that the entire earnings gap can be explained by factors other than sex discrimination when data on productivity are available. Second, since physicians are often self-employed, it suggests that we look skeptically at claims that the earnings differential among the self-employed is due to sex discrimination.

Since pay differences are almost completely caused by differences in jobs rather than the failure to obtain equal pay for equal work, understanding the earnings gap requires an explanation of the reasons why women, on the average, hold lower-paying jobs than men. Women have different job-related attributes and different amounts of these attributes than men. These differences, which are due to the dual role that the majority of women in this country still choose to play, explain most, if not all, of the earnings gap. We will only summarize here some of these differences that are far more plausible explanations for the earnings gap between men and women: [15]

1. Women have different educational attributes.[16]
2. Women invest less in on-the-job training.[17]
3. Women have less work experience.[18]
4. Women work fewer hours.[19]
5. Women have shorter job tenure.[20]
6. Women have less geographic mobility.[21]
7. Women are less motivated to maximize earnings and have different job related variables.[22]
8. Women are engaged in less dangerous work.[23]

Will the ERA Reduce the Pay Gap?

The only other kind of evidence brought forth by proponents of ERA to support their frequent assertion that the pay gap is evidence of sex discrimination in the labor market is strictly anecdotal. For example, during the ERA hearings in the House of Representatives in 1983, Governor Lamm testified that the Colorado state ERA had opened up opportunities for women and that women are better off economically there. Representative Patricia Schroeder of Colorado echoed the sentiment. But neither cited any statistics to back up their claims.

We are economists who attribute the pay gap to factors other than discrimination. However, even if we agreed with Professor Blau that sex discrimination in the labor market accounts for a significant share of the differential, we would still not endorse an Equal Rights Amendment to the Constitution as a remedy, because we do not think the ERA would reduce the pay gap. Employment discrimination is already illegal and violations of the law would still go through the appropriate agencies like the EEOC. Legal scholars tell us that the ERA would not add to our ability to combat sex discrimination and that we already have adequate Constitutional authority for insuring equal treatment of the sexes either by legislation or by invalidating any existing discriminatory laws.[24] The ERA advocates have failed to provide any evidence to the contrary. They have not explained how the ERA would reduce the earnings gap or what legal tools the ERA would add to our ability to combat discrimination.

Will an ERA cause greater equality in earnings between men and women? One way to answer this question is to examine what ERA has accomplished in the states which have amended their state Constitutions with an ERA.

State ERAs and the Pay Gap

Six state ERAs have language siniliar to Section 1 of the proposed Federal ERA: Colorado, Hawaii, Maryland, Pennsylvania, New Mexico, and Washington.[25] The decennial Census can provide estimates of male/female differences in earnings and incomes by state. We compare these six states with the U.S. average. In doing so we compute a six state average which is weighted by the number of working women in each state. Altogether the six ERA states contained about 11 percent of the women who worked full-time year around in 1980. The ratio of female to male earnings for this category of worker was .582 in the six ERA states, while the ratio for the entire U.S. was .596. Rather than greater equality in the ERA states, these 1980 Census data suggest that the male/female earnings gap was slightly larger in the ERA states than in the U.S. as a whole. Is this some kind of error or statistical aberration? To assure that it is not we make this comparison using different measurements, all taken from the Census. See Table 3.

Table 3

Female/Male Earnings Ratios

Definition of "Earnings"	Ratio: Female/Male	
	Six ERA States	Total U.S.
Earnings in 1979 of Persons Working 50-52 Weeks (usually working 35 or more hours per week)	58.3%	59.7%
Earnings in 1979 of Persons Working 50-52 Weeks (total, including part-time workers)	54.2%	55.6%
Income in 1979 of Persons Employed Full-time, Year-round	59.7%	59.8%
Earnings in 1969 of Persons Working 50-52 Weeks (total)	57.9%	56.3%

Source: U.S. Bureau of the Census, 1980 Census of Population, Characteristics of the Population, (PC 80-1-C), and 1980 Census of Population, Detailed Population Characteristics, (PC 80-1-D), 1983, and 1970 Census of Population.

The result in Table 3 is the same regardless of the definition used: the male/female earnings ratio for 1980 shows slightly greater equality in the U.S. as a whole than it does in the weighted average of the six ERA states. The difference between the ERA states and the rest of the U.S. in this respect is probably too small to merit comment, but there is definitely no support for the idea that there is greater earnings equality in the ERA states than in the rest of the U.S..

The only line in Table 3 where the ERA states show a higher ratio of female/male earnings than the total U.S. is the last one. This is an earnings ratio for 1969, taken from the 1970 Census, before most of these states passed their ERAs in the early 1970s. One might suspect that the effect of the state ERAs had been to raise the male/female earnings ratio to near the level of the U.S. average from some even lower level prior to passage of the state ERAs. However, the last line in Table 3 indicates that this was not the case. The 1970 Census showed greater earnings equality in the six states which passed state ERAs than in the U.S. as a whole. Though again the difference is probably too small to establish that the ERA states lost ground in this respect, the evidence in Table 3 definitely does not support the notion that the passage of ERAs in these six states had the effect of narrowing the male/female earnings gap.

The evidence cited in Table 3 contradicts the assertions of ERA advocates that there is sex discrimination in the labor market and that passage of an ERA will make a difference in women's earnings by helping to reduce it.

However, it might be that an ERA would make a difference over the long run, for example, by causing women to behave more like men in preparing themselves for employment. To examine this possibility we have prepared some more ratios dealing with education. See Table 4.

Table 4

Female/Male Education Ratios

Definition of Education	Ratio: Female/Total	
	Six ERA States	Total U.S.
Total enrollment in Higher Education, 1982	51.7%	51.5%
B.S. degrees in Engineering, 1983	13.4%	13.2%
B.S. degrees in Engineering, 1976	3.6%	3.6%

Source: U.S. Dept. of Commerce, Statistical Abstract, 1984, p.164, and Engineering Manpower Commission, ...

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The data in Table 4 indicate that women now enroll in higher education at about the same rate in the ERA states as in the U.S. as a whole. They make up a very slightly larger portion of the total enrollment in the ERA states, and also they are slightly more likely to receive degrees in engineering in the ERA states. This could have an effect on future male/female earnings differentials, because engineering is the college major leading to the highest salaries for both men and women and is a field which has historically enrolled few women. Note, however, that the growth in female enrollments in engineering has been dramatic in the non-ERA states as well as the ERA states. The differences observed here between ERA states and the rest of the U.S. are so small that, like those in Table 3, they are probably insignificant.

We have examined other male/female differences in ERA states vs. the total U.S., for example, in female poverty rates. We were unable to find significant differences, so we do not present the results. Our conclusion is that ERA has made no diffference in the male/female earnings ratio so far in these six states, and there is no indication that it will make any difference in the future. Further, the experience of the ERA states suggests that a Federal ERA would also have no effect on the male/female earnings ratio.

Footnotes

1. Eugene H. Becker, "Self-employed Workers: an Update to 1983", Monthly Labor Review, July 1984, p.18

2. Among "full time workers" 24 percent of the men compared to 10 percent of the women usually worked more than 40 hours per week in 1982. See Monthly Labor Review, June 1984, p.25. Using an assumption that extra earnings are proportional to extra hours this was estimated to account for 3.2 percentage points, i.e. nearly 10 percent of the earnings gap. See, Earl F. Mellor, "Investigating the Differences in the Weekly earnings of Women and Men", Monthly Labor Review , June 1984, p.25. Also June O'Neill of the Urban Institute estimates that the gap in hourly pay is about 30 percent. See her testimony to the House of Representatives, Committee on Post Office and Civil Service Hearings on the Federal Pay Equity Act of 1984, April 3-4, 1984, p. 263.

3. U.S. Dept. of Commerce, Statistical Abstract of the United States, 1984, p.169.

4. Francine Blau, 'The Economic Status of Women in the Labor Market," testimony before the Subcommittee on Civil and Constitutional Rights, op.cit., p.7.

5. Statement of June O'Neill at the Hearings before the Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, U.S. House of Representatives, Hearings on Federal Pay Equity Act of 1984, April 3-4, 1984 (Serial No. 98-29), p.263

6. Walter Block and Walter Williams, "Male-Female Earnings Differentials: A Critical Reappraisal," Journal of Labor Research, Vol. 2, No. 2, Fall 1981, p. 387.

7. Nancy S. Barrett, "Comments on the Persistence of the Male-Female Earnings Differentials," in F. Thomas Juster, Ed., The Distribution of Economic Well-Being, Studies in Income and Wealth, Vol 41, Conference on Research in Income and Wealth, National Bureau of Economic Research, Ballinger Publishing Co., Cambridge, Mass., 1977, p. 345.

8. Jacob Mincer, "Comment," in Cynthia B. Lloyd, et.al., Women in the Labor Market, Columbia University Press, 1979, p. 284.

9. Brian Chiplin, "An Evaluation of Sex Discrimination: Some Problems and a Suggested Prorientation," in Cynthia B. Lloyd, et.al., op.cit., p. 267.

10. Cotton Mather Lindsay, Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine, Law and Economics Center, University of Miami, Coral Gables, 1980, p. 34.

11. Richard K. Kamalich and Solomon W. Polachek, "Discrimination: Fact or Fiction? An Examination Using an Alternative Approach," Southern Economic Journal, Vol 49, No. 2, October 1982, pp. 460-461.

12. Harriet Zellner, "A Report on the Extent and Nature of Employment Discrimination Against Women," 1976 Manuscript, pp. 48-49, quoted in Cynthia Lloyd and Beth Neimi, The Economics of Sex Differentials, Columbia University Press, New York, 1979, p. 215.

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ERA and the 59¢ Wage Gap

Why Women Don't Get Equal Pay

Employed women are paid only 59¢ for every dollar paid to men. This Wage Gap exists primarily because women are concentrated at the bottom of the occupational ladder in low-paying, dead-end jobs.

Current equal employment laws are inadequate and enforcement is weak, at best. In addition, these laws cannot properly be enforced due to varying judicial and statutory standards of the courts.

Without the Equal Rights Amendment, female workers of not only this, but the next generations will face repeated and varied forms of discrimination. And because of discrimination in educational institutions, young women, year after year, continue to be tracked into the same low-paying clerical and service jobs. Without full equality under the Constitution, the patterns of sex discrimination in the workplace may never change.

Since 1955, the Wage Gap Has Widened.

The median earnings of year-round, full-time workers in 1955 were $2,719 for women and $4,252 for men, roughly 65¢ to the dollar for women. In 1979, earnings were $10,166 for women and $17,062 for men. Thus, women were paid 59¢ for every dollar paid to men. This means women have to work nine days to make what men are paid in five.

Over the years, for every dollar paid to men, women were paid the following:

1955	63.9¢	1972	57.9¢
1959	61.3¢	1973	56.6¢
1960	60.8¢	1975	58.8¢
1962	59.5¢	1977	58.9¢
1965	60.0¢	1978	59.4¢
1967	57.8¢	1979	59.6¢
1970	59.4¢		

The Wage Gap by Race.

	Annual Earnings	
White Males	$17,427	$1.00
Black Males	12,738	73¢
Hispanic Males	12,658	73¢
White Females	10,244	59¢
Black Females	9,476	54¢
Hispanic Females	8,466	49¢

Men are Paid More than Women at Every Age, but Considerable Differences Exist at Each Level.

Age Group	M	W	Women's Pay to Men's $
15-19	$7,519	$6,716	89¢
20-24	11,481	8,572	75¢
25-34	16,825	11,156	66¢
35-44	20,070	11,155	56¢
45-54	22,465	12,035	53¢
55-64	19,437	10,874	56¢
65+	16,107	10,664	66¢

Wage Gap by Education:

Education	M	W	Women's Pay to Men's $
Less than 8 years	$11,034	$7,425	67¢
8 years	14,475	7,766	54¢
High School:			
1-3 years	15,205	8,552	56¢
4 years	18,111	10,506	58¢
College:			
1-3 years	19,376	11,861	61¢
4 years	23,388	13,430	57¢
5+	25,858	16,694	65¢

As shown above, a women with a college degree continues to make less than men with an 8th grade education.

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Separate and Unequal

Despite their increasing numbers as wage earners, females are segregated in low-paying, underrated jobs. The sex segregation of women in the work force is a century-old story. Since the 1900's when women were a cheap source of labor in factories and textile mills, females have been separated into "women's jobs." This practice was created by so-called "protective legislation" which in reality, restricted and barred women from participating in better-paid jobs. Many of these archaic laws, which limited such things as the number of hours women may work and types of jobs they may perform, remain on the books. Although some of these statutes have been repealed and others are of questionable validity, they symbolize a type of discrimination under the law that is far from dead.

Wage Gap by Full-Time Occupations:

In each category and job title, even those dominated by women, females get paid less money.

In clerical jobs, for instance, women averaged about $9,855 per year. Men in clerical jobs made $16,503 or 40% more than females.

Below is a partial listing of detailed occupations as released by the Census Bureau for 1979.

Wage Gap by Full-Time Occupations and Job Titles:

Occupation	M	W	Women's Pay to Men's $
Clerical Workers	$16,503	$ 9,855	60¢
Typists	12,122	9,248	76¢
Cashiers	11,244	7,645	68¢
Service Workers	11,925	7,319	61¢
Private Household	12,991	3,618	28¢
Health Services	11,238	8,346	74¢
Professionals	21,310	13,701	64¢
Teachers	18,158	13,431	74¢
Grade & High School	16,905	13,107	78¢
College	22,958	16,219	71¢
Computer Specialists	21,774	18,342	84¢
Operatives	14,921	8,562	57¢
Manufacturing	15,109	8,725	58¢
Sales Workers	17,084	8,880	52¢
Sales Clerks	10,994	7,208	66¢
Retail Trade	12,245	7,297	60¢
Managers	21,835	11,705	54¢
Finance/Insurance	24,127	12,044	50¢
Public Administration	20,401	14,753	72¢
Laborers, except farm	11,974	8,985	75¢
Manufacturing	13,457	9,217	68¢
Construction	10,916	7,821	72¢
Craft Workers	17,106	10,585	62¢

Wage Gap by State: Women's Pay to Men's $

1.	District of Columbia	78.4¢
2.	New Jersey	66.1¢
3.	Vermont	65.4¢
4.	New York	64.9¢
5.	Tennessee	63.8¢
6.	Maryland	62.2¢
7.	Georgia	61.8¢
8.	North Carolina	61.1¢
9.	Michigan	61.1¢
10.	South Carolina	60.9¢
11.	Arkansas	60.7¢
12.	Massachusetts	60.7¢
13.	Florida	60.0¢
14.	Mississippi	60.0¢
15.	Virginia	59.8¢
16.	Pennsylvania	59.7¢
17.	New Hampshire	59.3¢
18.	Alabama	59.2¢
19.	Maine	59.1¢
20.	Oklahoma	58.6¢
21.	California	58.4¢
22.	Kentucky	58.4¢
23.	Minnesota	58.2¢
24.	Nevada	58.2¢
25.	New Mexico	58.0¢
26.	Ohio	57.9¢
27.	Colorado	57.9¢
28.	Kansas	57.8¢
29.	Hawaii	57.7¢
30.	Arizona	57.6¢
31.	Connecticut	57.5¢
32.	Illinois	57.5¢
33.	Wisconsin	57.5¢
34.	Nebraska	57.2¢
35.	South Dakota	57.1¢
36.	Texas	57.0¢
37.	Rhode Island	56.6¢
38.	Missouri	56.5¢
39.	North Dakota	56.0¢
40.	Iowa	55.7¢
41.	Idaho	55.4¢
42.	Montana	55.3¢
43.	Oregon	55.3¢
44.	Alaska	55.2¢
45.	Delaware	55.1¢
46.	West Virginia	55.0¢
47.	Washington	54.7¢
48.	Indiana	53.8¢
49.	Wyoming	53.7¢
50.	Utah	53.3¢
51.	Louisiana	49.8¢

The green and white 59¢ button has become a critical tool in NOW's drive for ratification of the Equal Rights Amendment. 59¢ represents more than just the Wage Gap between women and men. It symbolizes the economic injustice suffered by the average American woman. As this Gap continues, the need for the Equal Rights Amendment increases.

The ERA will be an important legal weapon to counter sex-based discrimination in employment regardless of the political climate.

The ERA will provide for more effective and aggressive enforcement of anti-discrimination laws.

The ERA will create a uniform standard that all courts must apply when they decide cases raising problems of sex discrimination in employment and education.

To become a part of the Constitution, the ERA must be ratified by June 30, 1982.

The above information was collected from the Bureau of Labor Statistics, U.S. Department of Labor and the Census Bureau of the U.S. Department of Commerce and is based on 1979 data of the annual P-60 series, No. 125. All information is based on median annual earnings of full-time, year-round workers with the exception of the tables by Age and Education which are based on annual income data. The State Wage Gap chart is based on a special study released in 1978 using 1975 data and is not issued annually.

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TESTIMONY OF MICHAEL LEVIN, PROFESSOR, CITY COLLEGE OF NEW YORK, FOR THE SUBCOMMITTEE ON THE CONSTITUTION

IMPLICATIONS OF THE E.R.A. FOR EMPLOYMENT

My name is Michael Levin. I am Professor of Philosophy at the City College of New York. My training as a philosopher has, I believe, given me the synoptic view of feminism needed for assessing its policy implications, a topic on which I have written extensively.

I have been asked to testify before this Committee on the implications of the ERA for employment, particularly private employment. Let me state at the outset the particular implications ERA would likely have in this area, bearing in mind that the courts' construction of ERA must remain hypothetical at this juncture. Then I will move to more detailed analyses.

--Entrenchment of the quota system

--Recognition of "comparable worth"

--The end of all protective legislation

--The redesign of employment criteria

--Erosion of seniority

--Extension of the Civil Rights Act to establishments of all sizes.

To assess its impact, it is useful to contrast the language of the ERA with the language of the 14th Amendment, to which it is sometimes compared. The 14th Amendment guarantees "equal protection of the laws," while Section 1 of the ERA guarantees "equality of rights under the law." The difference is that whereas the former wording pertains only to legal rights, the latter appears to introduce a broader notion of rights. For example, suppose there is a law against arson in a given locality. The 14th Amendment sees to it that everyone enjoys equally this legal right not to have one's property intentionally incinerated. It forbids the authorities from turning a blind eye because, say, arsonists attack a synagogue. The 14th Amendment thus refers to no rights beyond those created by law. Its guarantee of "due process" refers similarly to the fair administration of already extant laws, and its ban on the abridgement of "privileges and immunities," taken in historical context, refers to specific privileges and immunities.

By contrast, in no obvious way does the wording of the ERA confine the rights it guarantees to legal rights; it refers unqualifiedly to "equality of rights" to be guaranteed "under law." Rights not created by law could be discerned and, under ERA, the courts or Congress could be called upon to see that these extra-legal rights applied to men and women equally. Since the drafters of the ERA have avoided any construction which unambiguously expresses intent to protect equality of legal rights only, and since legislators are normally presumed to intend what they could but do not disavow, the courts have a powerful incentive to interpret ERA as reaching beyond legal rights.

The language of ERA can in fact sustain three increasingly broad interpretations. Given recent court decisions and the claims characteristic of the feminist movement, the broadest is most likely to be central to ERA litigation.

(1) The ERA might mean simply that the same laws must apply sex-neutrally to men and women.

(2) It might mean that no law may have even unintended differential effects on the sexes. This "unintended effects" test is the one currently used in applying the Civil Rights Act, and it has guided courts in overturning physical qualifications in the police and firefighting services. In line with Griggs v. Duke (1972), the Equal Employment Opportunity Commission demands that any private hiring criterion which differentially affects minorities and women must be shown to be "job related." Under interpretation (2), the ERA would fix the notion of "unintended discrimination" into the Constitution.

(3) Once "right" is detached from any legal definition, it is possible to argue that "equality of rights" is denied whenever the law merely permits private activities which allegedly affect women adversely. In The Equal Rights Handbook[1]--a book endorsed by the League of Women Voters--Riane Eisler argues that textbooks which concentrate on statesmen and generals foster feelings of inferiority in women and that on this basis the ERA would change "the educational programs of all [my emphasis], universities, vocational colleges and apprenticeship programs."[2] She also expects the ERA to support court action to require "proportional" numbers of female

roles of authority on television, since too many male authority figures deny females the psychological "option" of aiming for power.[3] Lawyers for the National Organization for Women have argued that ERA will remove differences in male and female athletic ability that are a "legacy of the past."[4] NOW asserts in a pamphlet entitled "Dollars and Sense Feminism" that ERA will address the fact that "Girls are steered away from mathematics, science, and the training needed for the better paying fields." There is, in short, a body of opinion which holds that the law must insure "equality of rights" by *actively impeding* private decisions (and the social institutions built thereon) that deny women "equal opportunity" in some psychological sense. Section 2 of the ERA, which empowers Congress to enforce Section 1 by "appropriate legislation," confers broad and vague power on Congress to outlaw private actions it finds objectionable. In *Fullilove* the Supreme Court deferred to Congress's judgement that racial set-asides are appropriate means for ending racial discrimination, and under ERA it is reasonable to expect equal deference toward Congress's judgement as to the best means for ending sex discrimination.

Turning now more specifically to employment, the ERA could, under the broad interpretation just outlined, be understood to require quotas in public and private employment. The "underrepresentation" of women in "non-traditional" jobs is widely held to perpetuate past discrimination by stereotypically limiting the field of vision of younger women to "traditional" jobs. On this theory, legislation which controls public employment would have to mandate "affirmative steps" to relieve the statistical imbalance, or be discriminatory. Courts now impose gender quotas on private employers under the aegis of Title VII of the Civil Rights Act; this controversial interpretation of the Civil Rights Act could, under ERA, become a mandate for the courts. Similarly, the regulations issued by the Department of Labor's Office of Contract Compliance could become mandatory, so that no Administration could withdraw them. It might be argued that these measures could be imposed on private employers only when there is "government involvement," but "government involvement" has been construed very broadly by the courts (see for example *Holodnak v. Avco*). Television stations are licensed by the Federal Communication Commission, large firms are normally both government contractors (so covered by the OFCC regulations) and receive goods carried on interstate highways (the courts have found that universities are "workplaces" because they receive goods via interstate highways). All firms pay taxes. As the *Bob Jones University* case showed, the government is now empowered to use its taxing powers punitively against violators of what is deemed public policy, even when the government has no further "involvement" with an activity.

To repeat, this interpretation of the ERA has been urged, explicitly or implicitly, by figures whose words must be taken seriously. When the Reagan Administration broached a modest easing of the Department of Labor's affirmative action program, the then-President of N.O.W. said

> It is a cutback on justice. The administration shows daily how badly the ERA is needed.[5]

Presumably, then, N.O.W. would litigate under ERA to stop any weakening of the Department of Labor's regulations by any administration that regarded them as too harsh. Recently, too, the NAACP announced that it would bring suit in federal court to stop the Justice Department from fighting court-ordered quotas on the basis of the *City of Memphis* decision. How successful they will be, no-one can tell. It is however reasonable to expect in light of this initiative that similar actions would be brought under ERA to prevent the Justice Department from fighting gender quotas.

Many serious scholars--of the sort courts commonly consult in discrimination cases--also construe the uncoerced formation of preferences and expectations as discriminatory:

> One could also classify as discrimination the pervasive cultural factors that have led to different roles for men and women and that shape the extent to which women are able to devote themselves to a career outside the home.[6]

> Economic gender roles in the traditional family work against economic parity in several ways. First, of course, they perpetuate gender-based stereotypes and stereotypical self-images... Second, women's household responsibilities compete for time and energy with labor force activities; while for men, household

> (financial support) responsibilities are complementary to labor force activities... [T]he relative positions of men and women in the labor force are not the outcomes of supply and demand in the conventional sense. Rather, they are the outcomes of a complicated set of traditional expectations that have to be analyzed in a model in which gender confers a set of distinct property rights on certain activities... Until we are willing to restructure the household economy as an egalitarian institution, for instance, by mandating equal time spent in child care and other unpaid activities, economic parity for women will never be realized.[7]

No-one can say with certainty that the ERA will be interpreted to require state intervention in spontaneous social processes that deny "economic parity," but neither can anyone say it will not. A DoL study entitled Women in Traditionally Male Jobs[8], when considering how firms might "make the most progress in providing equal opportunities for women in jobs of all kinds [and] meeting EEO goals," concluded that

> a ubiquitous problem was the lack of female interest in many blue-collar jobs--particularly those with such unattractive features as rotating shifts, heavy or dirty tasks, or regular exposure to such outside elements as weather or a hostile public.[9]

Lack of interest is here construed as an obstacle to equal opportunity.

On its face, ERA would seem to forbid quotas in public employment, and in conjunction with the Civil Rights Act, forbid quotas in private employment. One should therefore remember the words of Justice Brennan in Weber: since Congress intended the Civil Rights Act in part to stimulate black employment, it could not have intended to forbid private parties "from taking effective steps to accomplish the goal that Congress designed Title VII to achieve." Since Congress and the states would clearly have passed the ERA with the intent in part of improving the economic prospects of women, the courts may prove receptive to the argument that ERA actually encourages and even requires quotas.

The second possible or likely impact of ERA lies in the area of comparable worth. Just as the "underrepresentation" of women in certain job categories violates "economic parity," so does the statistical gap (of about 40%) between the average wages of full-time working men and full-time working women. While this gap is now widely conceded by economists to be produced by women's characteristic life choices,[10] concern with it has not abated because (as witness the citations from O'Neill and Barrett) these choices themselves are regarded as products of discrimination. On this [illegible], jobs held predominantly by women pay less than they are "worth" because sex role expectations herd women into "pink collar ghettoes," and because society in general undervalues what women do. What is relevant to ERA is the willingness of courts to override market-based wages on the basis of this doctrine.

Lower courts have upheld "comparable worth" under Title VII in *Gunther* and *AFSCME*; Congress could combine a broadly construed ERA with its right to "regulate commerce" in an attempt to alter the social factors causing the wage gap. If for example it is determined that the gap persists in part because girls are "excluded" from scientific and mathematical training, Congress could set aside funds for the education of girls in this area. This is already accepted practice--the authorization for the National Science Foundation in FY 1982-3 reserved $19 million for females--and would undoubtedly accelerate under ERA. Congress could under Sec. 2 require all schools receiving federal funds to take affirmative steps to steer girls into science. Congress could create a Fair Wage Agency to oversee all paid wages if it judged wage discrimination to be pervasive. ERA would almost certainly force public employers to cease setting wages against private sector benchmarks. Many states and municipalities have already undertaken "wage discrimination" studies of their own workforce, studies which, as *AFSCME* has shown, in themselves create legal liability for a Title VII suit. Such studies might be deemed mandatory under ERA.

No-one can say how likely such initiatives are, but a controlling constraint on all interpretations and implementations of the ERA is that it was passed with the Civil Rights Act (and of course the 14th Amendment) already on the books. Since legislatures do not customarily supplement stronger laws with weaker, the presumption must be that the ERA will have effects that extend beyond those achieved by the Civil Rights Act in conjunction with the 14th Amendment. The wholesale recognition of "comparable worth" would be an example of such an effect.

ERA would almost certainly overturn all legislation designed to protect women in the workplace. A law forbidding women to work in certain environments deprives them of the right to work in that environment possessed by men. If such laws do not violate the ERA, it is very hard to see what legal meaning the ERA can possibly have. Those involved in ERA advocacy have long recognized this implication. When, some years ago, Illinois began its ERA ratification debate, the Illinois legislature repealed Illinois' "Voluntary Overtime Act," which kept employers from requiring female employees to work overtime. The point of the repeal was to demonstrate how laws could be sex-neutralized piecemeal, without need for the ERA. This action did not end the debate, but--what is significant for our purposes--both sides agreed that the Voluntary Overtime Act was typical of measures the ERA would overturn.

Under the broader readings of ERA I have described, in-house corporate rules designed to protect women will conflict with the ERA in two ways. A firm which bars women from work deemed dangerous not only limits the opportunities of women within that firm, it reinforces discriminatory attitudes by perpetuating "stereotypes" about the frailty of women. This second argument is almost certain to be deployed in ERA litigation. It supported the Supreme Court's 1978 ban on laws stipulating that only husbands can pay alimony; in Justice Brennan's words, such laws risk "reinforcing stereotypes about the 'proper place' of women and their need for special protection" (Orr v. Orr). Orr was directed against a state action, but, as I mentioned earlier, it is possible to demonstrate "government involvement" in almost any enterprise large enough to have in-house protective rules.

Once again, the courts interpreting ERA will have to recognize the context in which it was passed. It came on top of the Civil Rights Act, and on top of many local laws and judicial decisions striking down protective rules of every sort. If the courts fail to interpret ERA as extending this ban on protective rules, they risk accusing the ERA of redundancy, which, as I have noted, the courts will be reluctant to do. They will therefore feel correspondingly obligated under ERA to outlaw all remaining protections for women in the workplace.

I would make two [illegible] points ~~in~~ clarification. First, the issue is not the intrinsic desireability of protective rules. The issue, rather, is whether the ERA will by implication eliminate all such protection for women via the courts, instead of directly through the deliberation of legislators. It is up to supporters of the ERA to show why the ERA does not have this implication. Second, it is pertinent to note that in 1981 the Soviet government reversed its position on the equality of women in the workforce and prohibited women from 460 jobs they had previously been actively encouraged to take.[11] This was an apparent response to a rising infant mortality rate caused by subjecting women to the same working conditions as men. It is not clear that the United States under the ERA could be as flexible in this matter as the Soviet Union.

The points made previously apply to hiring and promotional criteria. The courts already demand employment criteria with disparate impact on the sexes to be "job related." This does however allow criteria with sex-specific impact which are in some independent way reasonable. Thus a management-training program which requires that trainees be willing to relocate would be acceptable, even if it attracted mostly males. There is good reason for firms to want their managers to be flexible about their place of employment, so no discrimination is occurring if women prove more reluctant to relocate than men. Would such a hiring or training criterion survive ERA? Again, no-one can tell, and no court has issued an advisory opinion on the matter. However, as we have seen, many scholars believe that the social factors which limit female mobility are a form of discrimination, and the operative principle in Orr was that a certain law was discriminatory because it perpetuated "sex stereotypes." Furthermore, if ERA is not to be understood as subjecting employment criteria to even closer scrutiny than they currently receive under Title VII, just what is its legal meaning? The issue is at best very unclear, and the onus must lie on supporters of ERA to explain why hiring criteria will not become more difficult to justify under ERA.

I would add that the Affirmative Action plan recently announced by the Australian government[12] does appear to count as discriminatory any reasonable, job-related criterion which underselects women for sociological reasons. The bearing of this precedent on the ERA is not of course decisive, but it does illustrate what can happen to job criteria when an "effects" test of discrimination replaces an "intent" test, as has happened in the US.

A further issue is the likely impact of the ERA on public and private seniority systems, which are alleged to perpetuate past discrimination in an impermissible way. Men now enjoy seniority advantages in many areas, it is argued, because women were discriminatorily barred from these fields and of course could not accumulate their own seniority.

Even without ERA in the background, "equal opportunity" as currently construed is on a legal collision course with seniority. The "last hired, first fired" rule undoes the results of preferentially inserting women and members of other protected classes into the bottom of seniority hierarchies. The Supreme Court recently ruled in City of Memphis that seniority does take precedence over Affirmative Action, but, as several commentators have noted, City of Memphis was an extremely narrow ruling. It overturned a court-ordered quota system imposed on a public employer, and leaned heavily on the clause of the Civil Rights Act which exempts legitimate seniority systems. (The Civil Rights Act was extended to state and municipal employers in 1972.) What the courts will make of voluntarily undertaken seniority systems that conflict with Affirmative Action, in either the public or private sphere, is at this writing an unanswered question. It is pertinent to note, however, that the ERA contains no provision whatever for exempting bona fide seniority systems dominated by men, so that City of Memphis-like reasoning would be unavailable tocourts which construed the ERA as extending Title VII. If the courts decided that the passage of ERA meant, among other things, that a change in the statistical structure of the workforce had become a significant goal of public policy, it could reason therefrom that the process by which female entrants into the workforce make their way up seniority hierarchies was "too slow."

Civil service seniority is most obviously at the mercy of this argument, since tenure in public jobs is created by law and--under the terms of the foregoing argument--straightforwardly denies equal opportunity-rights under law. However, as I have been emphasizing in related contexts, state interest in employment extends far beyond the civil service. It extends, quite clearly, to the 30 million or so employees of government contractors. And in Argo v. Tamny the California Supreme Court reversed an otherwise entirely legal employment practice on grounds of its conflict with public policy.

The final issue I will consider is the 15-employee exemption granted by Title VII. On the theory that small firms involve the owner in intimate contact with his workforce, and that making him employ personnel he does not wish to hire infringes too far on his freedom of association, Title VII permits discrimination by firms with fewer than 15 employees. The ERA contains no such provision. Its language excludes no inequality as so trivial as to be best left to individual discretion. It seems to me entirely likely, therefore, that the courts would overturn this exemption. This is made more likely by the regular citation of this "gap" in Title VII by ERA advocates.[13] The citation of this gap also strongly suggests that ERA advocates would surely use it, were it passed, to litigate matters involving private employment and that, as I have argued, ERA is intended to do more than insure the sex-neutrality of laws.

I have cited seven likely consequences of the ERA: entrenchment of gender quotas, broad recognition of "comparable worth," the end of protective legislation, an extreme narrowing of fair employment criteria, the subordination of seniority to gender, and the universal extension of Title VII. There are two general reasons for expecting the ERA to have such broad, and very possibly broader, implications. First, it is not clear what else the ERA can be for. It cannot be for equalizing the application of existing laws to men and women or eliminating private discrimination, for these are functions of the 14th Amendment and Title VII. It cannot be for eliminating what little discriminatory labor legislation remains, since that can easily be eliminated without a Constitutional Amendment. Either the ERA reaches beyond the 14th Amendment and Title VII to create a far more extensive equality between the sexes than now exists, or it is empty--and these

Hearings would not have been held if anyone thought the ERA was an empty gesture.

Second, the concepts of equality, opportunity and right have come in recent decades to involve reference to social processes which might once have seemed beyond the ambit of the law. Many people, including the likeliest ERA litigants, take the obligation of the state to be not merely refraining from treating men and women differently, but even to curb those social and cultural patterns of behavior which "discriminatorily" foster gender differentiation. Since it nowhere limits itself to equality of legal rights and thus by implication steps beyond it, the ERA is perfectly formulated to embed such an extended concept of sex equality in the Constitution.

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NOTES

1. Avon, N.Y., 1978.
2. Ibid., p. 197.
3. Ibid., pp 193-197.
4. See Daniel Seligman, "Moving South on ERA," *Fortune*, May 1982.
5. *New York Daily News*, Sept. 10, 1981.
6. June O'Neill and Rachel Braun, *Women and the Labor Market: A Survey of Issues and Policies in the United States* (The Urban Institute, Washington, D. C., 1981), p. 63.
7. Nancy Barrett, "Obstacles to Economic Parity for Women," *Papers and Proceedings of the American Economics Association*, May 1982, pp. 163-165.
8. *Women in Traditionally Male Jobs: The Experience of Ten Public Utility Companies*, USDoL R&D Monograph 65, 1978.
9. Ibid., p. 117.
10. See for example J. Mincer and S. Polachek, "Family Investments in Human Capital: Earnings of Women," *Journal of Political Economy* 82 (2/2): S76-S108; Mincer and Polachek, "Women's Earnings Re-Examined," *Journal of Human Resources* 13(1): 118-34, 1978; Wal-

ter Block, "Economic Intervention, Discrimination and Unforeseen Consequences," in Block, ed., *Discrimination, Affirmative Action, and Equal Opportunity* (The Fraser Institute, Vancouver, B.C., 1981): 103-125.

11. See Alexandra Biryukova, *Soviet Women: Their Role in Society, The Economy, the Trade Unions* (Profizdat, Moscow, 1981): 31-41.

12. "Thus a maximum recruitment age of 30 for clerks would *indirectly discriminate* against women, as they carry the greater responsibility for child rearing and are likely to have left the workforce for several years and seek re-entry after they had passed the maximum recruitment age." *Affirmative Action for Women*, Department of Prime Minister and Cabinet, Australian Government Publishing Service, Canberra, May 1984. The Australian government now give every employer a tax-exempt payment of $750 for every female apprentice hired.

13. See for example the Testimony of Marna Tucker before this Committee, May 26, 1983.

Commentary

Comparable Worth: The Feminist Road to Socialism

Michael Levin

In December 1983, Federal Judge Jack Tanner accorded the fullest legal recognition it has so far received to the novel economic doctrine of "comparable worth." This doctrine holds that women in the work force are paid less than they are really "worth" in terms of the "value" of what they do. The recognition came in Judge Tanner's decision, in *American Federation of State, County, and Municipal Employees* [AFSCME] v. *Washington State*, that Washington owes 15,500 female state employees over four years' back pay and raises. Estimates of the cost of this judgment vary from $500 million to $1 billion. Whatever the eventual tally, Washington taxpayers will have to come up with it soon, as Judge Tanner has denied various motions by the state for time to accommodate its new burden. The case is currently under appeal to the Supreme Court, with the Reagan administration reluctant to side with Washington "against women" in an election year.

The history of *AFSCME v. Washington* reflects the development of the comparable-worth doctrine over the last decade, and illustrates as well the tactics on which comparable-worth advocates have come increasingly to rely. The idea itself has lately become the main item on the feminist agenda and has, moreover, been enshrined in the 1984 platform of the Democratic party. It is generally introduced with a statistic and a few examples intended to shock. One learns, first, that the average full-time working woman makes about sixty cents for every dollar earned by her full-time working male counterpart. To vivify the point, one may then be told that tree surgeons outearn librarians by several thousand dollars a year. As a sort of climax of unfairness, the advocacy literature of the National Organization of Office Workers (NOOW) stresses the case of a firm offering $745-1,090 per month for general clerks, who must analyze invoices and have "good telephone etiquette" and who are usually female, while offering $1,030-1,100 per month for shipping clerks, who need only write legibly and be able to "lift equipment in excess of 100 lbs." but who are usually male. It is presumed to be self-evident that the ability to talk on the telephone entitles one to more money than a strong back.

The big question is why women earn so little if the "human capital" they embody is so valuable and the jobs they do so important. The answers given by comparable-worth advocates may be ranked by the degree of conscious malevolence they attribute to employers. At one extreme stands the accusation that (male) employers actually conspire against women in order to reduce labor costs ("to maximize profits" is the preferred formulation). Thus, in 1980, the program director of NOOW assured the Equal Employment Opportunity Commission that banks "colluded to hold down wages": her evidence was that (a) bank presidents regularly met for lunch, and (b) men used "cultural stereotypes" when arguing with female union organizers. Such charges, however, are not taken very seriously even within comparable-worth circles, for wage-fixing cartels, quite apart from being illegal, would be vulnerable to raids by independent firms willing to pay more for talented females. Nor is it clear why employers willing and able to rig substandard wages for women would not also rig equally substandard wages for men.

The case for conspiracy being so flimsy, comparable-worth advocates prefer two other explanations of the wage gap. The first is the "herding" of women into a "pink-collar ghetto" of typically female jobs, which floods the market and depresses wages for these jobs. According to a study done for the Michigan Department of Labor:

> The reason for sex-related pay differentials [is] the traditional sex-segregation of most jobs. Under this hypothesis, the result of "crowding" of females into the clerical and service occupations is an oversupply of labor in these occupations, with resulting lower wages.

But this "hypothesis" rests most uneasily with charges of sexual discrimination, for it concedes that at bottom female wages are determined by the market forces of supply and demand. The

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more would-be secretaries there are, the less an employer must offer to get secretarial help—just as, conversely, the recent scarcity of nurses has driven up nursing salaries. Secretarial wages may be considered "discriminatory" and the supply of secretaries an oversupply only if "crowding" is not a metaphor but a literal description of employers forcing women into some jobs and barring them from others. The supposition that such practices exist is entirely implausible in light of the Equal Employment Opportunity Act and Title VII of the Civil Rights Act, which explicitly forbid them; nor has any comparable-worth advocate produced a single instance of such activities occurring in the last decade. But as this citation from the Michigan Department of Labor suggests, one of the more ominous themes in the comparable-worth campaign is its implicit claim that the spontaneous social factors which affect women's vocational choices are themselves forms of discrimination calling for government correction.

Since the notion of "ghettoization" is so dangerously ambiguous, comparable-worth advocates add a final factor to explain the wage gap: the systematic undervaluing of women's work as part of society's overall disregard for women. Whereas classical economics says that in a free market the wages of all workers reflect their "marginal productivity," no matter what prejudices their employers may harbor, the comparable-worth case holds that market mechanisms "don't work" for women. In the words of *Women, Work, and Wages*, a report prepared in 1981 by the National Academy of Sciences (NAS):

> In many instances . . . jobs held mainly by women and minorities pay less at least in part *because* they are held mainly by women and minorities . . . the differentials in average pay for jobs held mainly by women and those held mainly by men persist when the characteristics of jobs thought to affect their value and the characteristics of workers thought to affect their productivity are held constant. [Emphasis added]

In a remarkable display of pseudo-rigor, the NAS even produced a mathematical "coefficient of discrimination" for calculating by how much the proportion of females in a job lowers its wages.

The tricky part, of course, is being sure one has identified *all* the "characteristics" that affect the wages for any particular job. In practice, this means hiring a team of "management experts," like Hays Associates or Norman Willis or the Arthur Young Co. (authors of the Michigan report), to make a determination. As one might expect, this also in practice inexorably links the question of what factors do determine wages to the quite separate question of what factors, in the opinion of management experts, *ought* to determine wages.

The experts typically resolve any given job into a few standard factors—skill, effort, responsibility, and working conditions, or some variants thereof—and then assign a score to each factor. Jobs with equal point totals, when all dimensions are combined, are regarded as equally "valuable." The heart of the procedure—the assignment of points—is entirely subjective and universally admitted to be so by the firms that specialize in the practice. Nevertheless, it was in terms of such evaluation surveys that the NAS found women to be victims of wage discrimination.

THUS we arrive at the position of the state of Washington in the early 1970's when, heeding feminist imperatives, its governor commissioned the Willis firm to run a "point-factor analysis" of wage rates. Like most public employers, Washington at the time was compensating at the rates prevailing for the nearest corresponding jobs in the private sector. But when the first Willis survey found that predominantly female jobs (those done 70 percent or more by women) paid on average 20 percent less than jobs of the same "worth" done predominantly by men, the Washington Personnel Board resolved in 1976 to use the Willis analysis in setting wages. No steps, however, were taken in this direction, in part probably because of a memorandum cautioning that doing so would cost the state almost $65 million—in retrospect, a twentyfold underestimate. Eventually, it was not the results of the Willis survey *per se*, but Washington's failure to abide by studies it had commissioned and resolved to respect, that Judge Tanner used to sustain his finding of discrimination. Washington was hoist on the petard of its own impeccably progressive intentions.

It is vital to emphasize that equal pay for the *same* work was not at issue in the *AFSCME* suit and has not been an issue since the passage of the 1963 Equal Pay Act. Moreover, there is not a single sentence in the U.S. Code or anywhere else to give comparable worth any statutory basis whatever. What enabled AFSCME to bring its suit in the first place was the Supreme Court's 1981 ruling in *Gunther v. Washington* that litigants have a right to test the comparable-worth concept in federal court under the rubric of Title VII of the 1964 Civil Rights Act. (*Gunther* concerned female prison guards of female prisoners, who claimed that their work was as valuable as that done by better-paid male guards of male prisoners in higher security prisons.) *AFSCME* was simply the first droplet in the flood of litigation released by *Gunther*.

It is true that neither of these two key comparable-worth decisions directly endorses comparable worth, nor is either a bolt from the federal blue into the wage policies of localities or industry. At the same time, however, it would be naive not to expect *AFSCME* to be replayed in the near future. Over a dozen states have undertaken comparable-worth studies of their own work forces, and there is agitation for such studies in virtually every other state and in hundreds of municipalities. These studies are invariably accompanied by disclaimers of legislative intent—"Let's simply see if our state is perpetuating discrimination"—but *AFSCME* is an obvious basis for legal action once these studies uncover wage discrimination, as they always seem to do.

To this commotion may be added the 1982 endorsement by the leadership of the Democratic party of "equal pay for work of comparable social value,"[*] a doctrine even more radical than "equal pay for work of comparable economic value." Walter Mondale is on record as supporting "equal pay for comparable *effort*," more radical still. Congress has held hearings on the issue. Comparable-worth advocates are predictably eager to impose it on the private sector; such is the stated position of the New York *Times*. An advocate of comparable worth has argued that women who occupy "traditionally segregated jobs" have a prima-facie case for wage discrimination, with the burden of disproof falling on the employer[†]—an impossible burden to discharge since "wage discrimination" was unheard of until recently, and so no employer could have acted affirmatively to prevent it. Clearly, comparable worth has followed some other notable ideas from the feminist agenda onto the national agenda.

II

IS IT true that discrimination explains why women earn less than men? The National Academy of Sciences concluded from its survey of the statistical literature that "differences in education, labor-force experience, labor-force commitment, or other human-capital factors believed to contribute to productivity" could explain, at most, half the wage gap. It would seem evident that the failure to explain the wage gap by a given set of variables is consistent with the operation of undiscovered variables having nothing to do with discrimination. Yet comparable-worth advocates have managed to obscure this point by expeditious wordplay. In the jargon of the moment, they conceive discrimination as a "residual." This means that certain variables are selected *a priori* as relevant to wages, and discrimination is then defined as what these variables cannot explain.

In the last two decades the traditional test for discrimination—"intent"—has yielded to the much more dubious test of "effects," but the "residue" test goes beyond even "effects." Stigmatizing a practice as "discriminatory in effect" requires at least that one identify some specific human activity and show that it has some definite effect on the sexes. The "residue" test is uncontrolled, conflating as discriminatory all situations in which gender differences are observed, possibly including those caused by subtle innate biological sex differences.

The NAS states:

> The burden should rest on the designer of the job-evaluation system to identify and explicitly incorporate all factors regarded as legitimate components of pay differences between men and women, not merely to assert the possibility that including unspecified and unmeasured factors or improving the measurement of existing factors could reduce the "discrimination" coefficient.

In English, this means identifying discrimination with the wage gap itself, since in practice all "unmeasured factors" are assumed irrelevant. By fiat, then, the NAS is able to dismiss such factors as differences in drive and family sex roles as imaginary.

Thus, none of the studies surveyed by the NAS properly controlled for so obvious a variable as marital status: the wages of *never-married* women with full-time, continuous labor-force participation are virtually the same as those of the average married full-time working male. Women earn less than men, it seems, because they want jobs permitting easy exit from and reentry into the labor force, preferences which flow in turn from the average married woman's perception of her family as being her primary responsibility, especially when her children are young. Men, on the other hand, see themselves as breadwinners, whose obligation to make money increases as children come along. Perhaps a further factor will prove to be the male's amply-documented greater innate competitiveness, his tendency to do whatever is necessary to ascend hierarchies, including the hierarchies of modern business organizations.

Would it exonerate all concerned of the charge of wage discrimination if the wage gap turned out to be due to differences in family sex roles? Not at all; these basic differences between men and women simply become further injustices:

> Criticizing women for "lower labor force participation rates than men, moving in and out of the labor force more frequently than men, and being more likely than men to be seeking part-time work only" fails to take certain fundamental facts into account. For instance, among *Fortune* 500 executives, who is taking care of the children? Whose responsibility is it to juggle career demands with child-bearing and child-caring? Did it ever occur to you that the reason women seem less committed to careers is that they don't have the luxury of a wife to take care of home and children while they blaze their career paths?[**]

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[*] *Rebuilding the Road to Opportunity*, Report of the Democratic Caucus, U.S. House of Representatives, September 1982.

[†] Sheila Blumrosen, "Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964," *University of Michigan Journal of Law Reform*, 1979.

[**] Letter from Susan Sharp of Sharp and Co. to *Fortune*, September 6, 1982.

This rage at all difference in the basic social role of the sexes underlies the campaign for comparable worth.

III

CRITICS of comparable worth understandably concentrate on the biases inherent in any list of factors "deserving" compensation. For instance, all job-evaluation systems I have seen assume that a college degree enhances a worker's "intrinsic value," a bit of snobbery which shows only that the people who design evaluation systems have all been to college. Yet this is not what is fundamentally wrong with comparable worth. For while the range of objective judgments about "training" or "responsibility" is far too narrow to support sweeping doctrines like comparable worth, such judgments can nonetheless be made. Planning shuttle missions in space plainly carries greater responsibility in terms of lives and hardware than does teaching philosophy. And planning space missions is plainly harder than adding up columns of figures, if only because the latter skill is just one part of the former.

For the sake of argument, then, let us assume a skill which is objectively difficult and reflects much objectively measurable training on the part of its practitioner; but let us also suppose it is a skill no one is interested in. Consider a person who is adept at throwing arrows into the air and catching them with his teeth. This is extremely difficult to do, and takes endless practice. Basketball players earning six-figure salaries do nothing so demanding. Unhappily, nobody wants to hire our man to catch arrows. He must eke out a living as a street entertainer. Is he somehow being denied his intrinsic worth by passers-by who flip him quarters? Does a circus scout who offers him a pittance for his act undershoot what the knack entitles him to? The answers would seem to be no. Intrinsic moral and aesthetic merit aside, the skill is economically worthless—unable to command other goods and services—if no one will pay for it. Only someone willing to trade something for the service in question can confer economic worth on it.

Money itself is merely the conventional measure of the capacity of a thing to prompt people to exchange their own goods for it. A thing's price summarizes the ebb and flow of its performance in exchange, and has no independent meaning. And here is the intellectual black hole at the center of comparable worth: there is no such thing as intrinsic economic value. It is a chimera. Conversely, the willingness to supplant the market price of labor or anything else means the willingness to override the liberty of exchange, association, and contract expressed by market prices. In each particular comparable-worth proposal, the question is only one of determining where freedom is to be suppressed.

This crucial point is easy enough to see in connection with material objects. It would be absurd to maintain that copper deserves to cost more than gold because it conducts electricity better; gold and copper, absent people's actual desires for them, would just be stuff in the ground. The point is also reasonably clear where the "just price" of money—*i.e.*, permissible interest rates—is concerned. But the market determination of wages meets much greater resistance, perhaps because it puts our value so squarely in the eyes of our beholders.

The example of the arrow-catcher may be dismissed as a contrivance. Contrived it is, which proves its point. The skill seems freakish, worthless, precisely because no one has ever valued it or is ever likely to do so. Our very perception of skillfulness, in other words, is determined by the market. The ability to draw, or set bones, or fix automobiles, seems "naturally" compensable because we are used to there being a market for such skills. But the once "naturally" compensable ability to make buggy whips does not seem so today, when people no longer want buggy whips.

A LONG line of thinkers, extending back through Marx to Ricardo, has attempted, and failed, to devise non-market criteria of economic value for labor; almost every proposal in this tradition can be found in the comparable-worth literature. The straight Marxist appeal to the "social value" of work founders on the need to specify "social value." If something is "socially valuable" just because a great many people are willing to pay top dollar for it, we are back to the market; and there is no other way to tell that society wants something than its willingness to try hard to get it.

A more frequent proposal equates the value of a job with its contribution to the employer's profit. We may overlook the obvious difficulty: that this would make wages fluctuate wildly with exogenous factors—think of proofreaders becoming superfluous when a publisher's profits are due to a single best-seller. Let us, instead, consider wage rates. Classical economics holds that each employee tends to get his marginal return on his product as he bargains omnisciently with his employers: If Jones's labor is worth $20 to Smith, Jones can return Smith's wage offer of $15 with a counterdemand for $16, which is still attractive to Smith. But then Jones can hold out for $17, $19, $19.50 . . . until Smith must agree to pay the full $20. But in this case the market itself already bestows a contribution to profit. In reality, of course, the employer must retain some portion of his employee's product if he is to have any reason for hiring him. But then, the contribution criterion means deciding what portion of a businessman's profit he "deserves" to keep, an entirely arbitrary decision.

Now, if one assumes that males get the "right" return on their product while females don't, it might seem fairer and simpler to give each worker in a firm the *same* return on his product, without having to decide on a proper rate of return. A secretary, say, would be entitled to 90 percent of her product if holders of benchmark jobs like engineers got 90 percent of theirs. But benchmark figures must be determined independently, which means by the market. A firm finds that to secure the labor of scarce engineers it must pay what amounts to 90 percent of what they earn for the firm. But if so, what fairness requires is not that the return for secretaries be proportionate to that for engineers, but that it be determined *in the same way*—which is to say, by the market. Making the availability of engineers a factor in compensating secretaries is neither equitable nor rational.

What lends an air of unreality to every version of the "contribution to profit" theory is the fact that each of several jobs may be necessary for a firm's profitability. Since it is logically impossible to give all the profits to each of several job categories, what does and must happen in the real world, in which a firm would be paralyzed both without secretaries and without engineers, is recruitment of secretaries and engineers at market wages, the wages they all agree to accept. As the English economist Thomas Hodgskin wrote, there is no "principle or rule . . . for dividing the produce of joint labor among different individuals who concur in the producing, but the judgment of individuals themselves."

A cognate difficulty undermines the related test of basing a job's wages on its contribution to the "organization's objectives," to quote the Michigan comparable-worth study. This is a measure often suggested for non-market organizations like universities, governments, and foundations. Yet the achievement of non-monetary goals also requires the cooperation of many people whose contributions cannot be isolated *a priori*. Furthermore, to compete with profit-seeking organizations in attracting a sufficiently talented work force, nonprofit organizations must in any case heed market decrees about wages. Moreover, determining some government post's contribution to the "overall objectives" of government presupposes clarity about what the "overall objectives" of government are, a goal that has eluded political philosophers for some centuries. If government has accommodated comparable worth more readily than private organizations, this is not because governments have found comparable worth easier to construe; governments can finance their follies by taxation, with no worries about buyer loyalty.

Finally, comparable-worth criteria that stress job characteristics like working conditions face all the problems that beset the use of traits like skill. Collecting refuse may be "unpleasant," but it is pleasant enough to attract applicants at the going rate. We do not need elaborate analysis to see that the market wage adequately compensates refuse collectors for the unpleasantness they endure. And, again, our very perception of this circumstance is a response to the market. Most American farm workers would find intolerable the backbreaking chores that constituted farming a millennium ago.

Skill, effort, and training do play a role in determining pay. Someone who has invested much time preparing for a hard job will drive a hard bargain. More importantly, the harder a job and the training for it, the fewer candidates there will be, driving up wages still further. This naturally high correlation among difficulty, training, and salary explains the feeling that demanding jobs "deserve" higher pay. In the end, however, these factors raise wages only by influencing the choices of bargainers.

IV

Appeal to the free market may appear slightly musty in these days of the minimum wage, banking regulation, the National Labor Relations Act, and cancer warnings on cigarettes. Yet these familiar measures are modifications of laissez faire, while the rationale and scope of comparable worth make it a frontal assault on *any* form of economic liberty.

To begin with, none of the extant labor laws is based on a non-market notion of value. The minimum wage was intended to insure everyone a "decent" wage, without pretense that every worker's output is "really" worth $3.35 an hour. The National Labor Relations Act banned "anti-union animus" on the part of management not because collectively negotiated wages were thought to reflect value more accurately, but to secure "labor peace." And, while the minimum wage truncates the range of possible bargains, and the National Labor Relations Act affects a wide range of negotiations, both measures still permit very extensive play to market forces. Unionized plumbers may not get strict market wages, but their wages approximate market value.

Overall, the many regulations that control banking, trucking, the airlines, mergers, work-place safety, and the like are (a) industry-specific or activity-specific, and (b) intended, rightly or wrongly, to preserve the free market against its own excesses. Wage and price controls, when imposed, are usually justified as "temporary measures" to curb inflation. Even socialism itself was originally conceived as a way of harnessing in a more efficient way the productive capacity generated by capitalism. Because "New Deal"-type regulations thus purport to secure specific results, they imply built-in tests to which they can be held. A ceiling on bank interest rates is supposed to help Savings and Loan Associations, so if S & L's keep failing at the same rate after the ceiling is in place, the ceiling has not worked.

Comparable worth, by contrast, contains none of these self-limitations. Its scope includes every job in the work force; and since most jobs are "sex segregated," most pay scales would be open to challenge. Nor does comparable worth pretend to facilitate the best tendencies of the free market; rather, it is explicit about seeking to flout the market. It does this, moreover, without a clear specification of what positive goal is to be achieved beyond "justice"; under this mantle, the pursuit of comparable worth can discount any economic havoc it wreaks as irrelevant to its "success." (A similar criterion now governs assessment of affirmative action, deemed "successful" if it increases the number of women and minorities in well-paying positions, no matter the cost in fairness or efficiency of putting them there.) Penn Kemble has called comparable worth "a feminist road to socialism."[*] if so, it is socialism without a plan.

It is instructive to reflect that comparable worth can never come about through voluntary agreement. If a firm can get secretaries at a market-clearing wage, so can its competitors. Were it to raise its secretarial wages for ethical reasons, its labor costs would rise without any gain in productivity, its products would cost more than those of its competitors, and it would slide into failure. Comparable worth presents what economists call a "coordination problem": it must be introduced all at once, or not at all. Needless to say, the favored agency for solving coordination problems is the government.

THE central point is this: whether or not the marketplace offers an appropriate ideal of justice, wages will in fact tend to be set at their market value so long as people retain anything like their accustomed economic liberty. The only alternative to the market is systematic state control. Comparable worth can be implemented only by endless government intervention, in the words of a pre-*Gunther* federal court, "pregnant with the possibility of disrupting the entire economic system of America."

For if "wage discrimination" is the wage gap itself, whatever its causes, nothing less than the elimination of the gap will be allowed to count as ending discrimination. To grasp what this would mean, consider that in 1983 there were 49 million full-time working men whose median income was $20,683, and 31 million full-time working women, median income $12,172. To close the wage gap, employers would have had to pay each woman $8,500 more, or about $250 billion, or—in still other terms—about 15 percent of total wages paid in 1983. These costs would no doubt have been passed on to consumers as higher prices, and as higher taxes to finance government services.

One might think the gap could be closed more slowly by freezing or slowing the growth of men's salaries until women's salaries grew to parity. This is now the policy in San Jose, California, where the city government worked out a comparable-worth agreement with AFSCME. It seems unlikely, however, that men or their unions would tolerate this arrangement on a wide scale. A man who, thanks to comparable worth, gets a smaller raise than he would have otherwise gotten has, so far as he is concerned, suffered a pay cut. Comparable worth is advertised as a boon for working women struggling to help their families with a second income, but it does not help a family to hold down the husband's wages so the wife's can be artificially boosted. On balance, the likeliest short-term effect of comparable worth would be to boost everyone's wages, thereby flooding the market with new money in the absence of new goods—the standard recipe for inflation. And this might be the occasion for the government to begin coordinating wage policy to assure the proper closure of the wage gap.

The longer-run consequence of inflating female salaries and holding down male salaries in defiance of the market would be a massive disincentive to work. Women would already be getting more without having to work harder, and men would not be permitted to get more even if they did work harder. Why, then, should anyone work harder? Nor would the work force become more "integrated," since women would have no incentive to leave "women's work" once it paid as much as less pleasant "masculine" work. If anything, men would try to invade the newly well-paid female sphere. And at the same time men were queuing up for the typing pool, there would be no reason for a man to undertake an unpleasant job like collecting refuse if high wages for it were no longer available as an inducement—so we would almost certainly see critical job shortages. Add to this the undoubted persistence of a quota system which would prevent management from firing women to make room for (possibly more desirable) men, and a crisis of extreme proportions would be upon us. If recent history teaches us anything, it is that governments meet crises of their own making with more of the coercive rules that created the crisis in the first place.

V

IT is not surprising that a society which has absorbed busing, quotas, *Miranda*, and publicly funded abortion should look on comparable worth with numb bemusement. One can almost sympathize with a businessman happy to reach the end of a profitable quarter without some new horror from the Federal Register landing on him. It is disheartening nonetheless that the American Compensation Association should summarize the attitude of the business community toward comparable worth in these words: "Planning for the inevitable appears to be the appropriate response."[*] Like such otherwise perceptive commentators as John Bunzel (who sees comparable worth as part of the "revolution of rising entitlements"), the ACA has missed the distinctive element in the comparable-worth campaign.

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[*] "A New Direction for the Democrats?," COMMENTARY, October 1982.

Feminists realize at some level that men and women view work differently—but they believe that this should not be, and, as do all those who wish people were other than they are, feminists want the government to correct the situation. Inverting cause and effect, they ask the government to curb one manifestation of sex differentiation. The real enemy feminism has targeted, however, is not some isolable inequity in the wage system but the family and the rest of the malign "social conditioning" which make men and women act differently, in the economy and elsewhere.

That is why one must view with mixed feelings those critics of the comparable-worth idea who fall in with the "social-conditioning" theory. Lee Smith writes that "in large part, the [wage] disparity stems from traditions and prejudices that have channeled women into low-paying jobs." Bunzel conjectures that "greater interests and responsibilities in the home" may explain the number of women in low-paying jobs, but that this may "reflect socialization toward traditional roles that, for many women, begins in childhood." Cotton Mather Lindsay, the least compromising critic of comparable worth, cites as the most important factor limiting women's access to high-paying occupations "the subtle socialization process beginning in childhood, which orients women toward domestic careers." Even John Warehman, who bluntly asserts that "women lack the necessary emotional strength to achieve executive success," says "women's 'emotional deficiencies' spring from patterns of dependency established during their childhood." These writers treat the origin of this socialization itself as a mystery.

Economists may be forgiven for not knowing that research on sex differences shows these different social roles to be innate, or so close to innate as to be uneliminable features of every human society—but when they reject comparable worth only because it penalizes employers who "had nothing to do with producing . . . female inhibitions" (in the words of Carl Hoffman, who has conducted much research on male and female motivation in the business world), they abet the most irresponsible feminist tendencies. If an adolescent girl's "socialization" really forced her to choose low-paying nursing over high-paying surgery, she may not have been cheated by her employer but she has certainly been deprived. Wouldn't it be well to change custom and tradition so that little girls were raised to be prepared emotionally for becoming surgeons? And isn't the state allowed to do a little of the altering for the general good? Thus is the state given a blank check for the sort of intrusion of which comparable worth is an extreme instance.

Prophesying the end of the free market is a sure way to be labeled a crank. On the other hand, I am not encouraged by confident assurances that the free market can survive anything. Howard Ruff, in one of his cheerfully apocalyptic guides to the future, compares the free market to Rasputin. Rasputin was poisoned, and he was shot, and still he survived. So, writes Ruff, the regulators have done everything to American capitalism, and still it survives. Unfortunately, Ruff overlooks a final detail. Eventually, Rasputin's tormentors threw him in the river. That killed him.

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[*] "Comparable Worth . . . A Few Thoughts on the Issue," *ACA News*, February 1984.

(The Wall Street Journal, January 20, 1984)

The 'Comparable Worth' Trap

By June O'Neill

Equal pay for jobs of comparable value has emerged as a goal of the women's movement. Advocates of this concept of "comparable worth" would have us abandon the market and substitute wage-setting boards to determine what women's occupations are "really worth" compared with men's. It recently received the blessings of a federal judge in the case of AFSCME vs. the state of Washington, where sex discrimination was equated with failure to pay women according to the comparable worth of their jobs.

At least as far back as the Middle Ages, the concept of "just price" has had some appeal. Practical considerations, however, have won out over philosophical musings. Most people recognize how inefficient it would be to use an evaluation system independent of the market to set wages or prices of consumer goods. So, for example, we accept a higher price for diamonds than for water, even though water is undoubtedly more important to our survival, and a higher wage for lawyers or engineers than for clergymen or bricklayers even though they may be equally important to our well-being.

The case for comparable worth is based on two beliefs: that women are relegated to certain jobs because of sex discrimination in the labor market and that pay in those jobs is low simply because women hold them. (The implication is that if nurses and secretaries were men, the pay in these occupations would rise.)

Cultural Roles

The first argument may have some validity. Historically, there are many examples of barriers that restricted women's entry into particular occupations. These have included state laws governing women's hours and working conditions and the exclusion of women from certain schools. Individual employers who discriminate against women can always be found.

But the occupational patterns of men and women today also can be explained by factors that would operate even in the absence of any employer discrimination. The major reason men and women enter different occupations stems from the difference in their cultural roles, which are shaped early in life. Work roles may be starting to merge for young women and men, but most women already in the labor force have divided their efforts between home and work, spending about half as many years as men in the labor market. While employed, they have worked fewer hours. Research suggests that pay in women's occupations—for both women and men—is lower largely because of differences in education and on-the-job experience as well as differences in hours and other working conditions (such as exposure to hazards or outdoor work).

Comparable worth would do nothing to remedy discrimination. To the contrary, comparable worth would reduce the incentive for women to seek access to nontraditional jobs because it would increase the pay in predominantly female jobs. The more logical remedy for discriminatory barriers—and one squarely in the American tradition of fair play—is to eliminate them. Up to now this has been the traditional goal of feminists.

What would happen if wages were set in accordance with comparable-worth standards and independently of market forces? Take the example of the state of Washington. In the 1970s the state hired a job-evaluation firm to help a committee set pay scales for state employees. The committee's task was to assign points on the basis of knowledge and skills, mental demands, accountability and working conditions. In the evaluation, a registered nurse won 573 points, the highest number of points of any job. A computer systems analyst received only 426 points. In the market, however, computer systems analysts earn about 50% more than registered nurses.

> *Raising the pay of clerical jobs, teaching and nursing above the market rate would reduce the incentive to enter other occupations, and simply lead to an oversupply in women's fields.*

The Washington study differed radically from the market in its assessment throughout the job schedule. A clerical supervisor received a higher rating than a chemist, yet the market rewards chemists with 41% higher pay. The evaluation assigned an electrician the same points for knowledge and skills and mental demands as a beginning secretary and five points less for accountability. Truck drivers were ranked at the bottom, receiving fewer points than telephone operators or retail clerks. The market, however, pays truck drivers 30% more than telephone operators and the differential is wider for retail clerks.

If a private firm employing both registered nurses and computer systems analysts were required to accept the rankings from the Washington state study, it would have to make significant pay adjustments. It could either lower the salaries of systems analysts or raise the pay of nurses. If it lowered the pay of systems analysts it would find it difficult to retain or recruit them. If it raised the pay of nurses it also would have to raise its prices and likely would end up reducing the number of registered nurses it employed as consumer demand for the service fell. Some women would benefit, but other women would lose. (In the Washington case, the state employee union explicitly requested and won a judgment that the wages in female occupations be raised, and not that wages to any male occupations be lowered.)

Public Sector

Of course, if the employer is a state government, the consequences would be somewhat different. The public sector does not face the rigors of competition to the same extent as a private firm, which probably explains why public-sector employee unions are in the forefront of the comparable-worth movement. The state, unlike a company, can pay the bill for the higher pay by raising taxes. But if taxpayers are unwilling to foot the bill, the result would be similar to that in the private firm: unemployment of government workers, particularly women in predominantly female occupations, as government services are curtailed.

Is the solution then to go beyond a state government or an individual company and institute nationwide pay scales based on comparable-worth principles? That would bring us to a planned economy, with all the allocation problems of centralized wages. And it would not result in more women becoming electricians, physicists, farmers or truck drivers. In fact, it likely would retard the substantial progress that has been made in the past decade. Women have moved into predominantly male occupations, and younger women have dramatically shifted their educational and occupational goals. They have been undertaking the additional training required for law, medicine and engineering because the higher pay they can obtain from the investment makes it worthwhile. Raising the pay of clerical jobs, teaching and nursing above the market rate would reduce the incentive to enter other occupations, and simply lead to an oversupply in women's fields, making it still harder to find a stable solution to the problem.

If women have been discouraged by society or barred by employers from entering certain occupations, the appropriate response is to remove the barriers, not to abolish supply and demand. Comparable worth is no shortcut to equality. It is the road to economic disruption and will benefit no one.

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TESTIMONY OF CHARLES E. RICE, EQUAL RIGHTS AMENDMENT AND CRIMINAL LAW, PROFESSOR OF LAW, NOTRE DAME LAW SCHOOL, SUBMITTED SUBCOMMITTEE ON THE CONSTITUTION, UNITED STATES SENATE, DECEMBER 1, 1984

The subject of this testimony is the likely effect of the Equal Rights Amendment on state criminal laws which involve gender classifications or which are applied differently as between the sexes. This issue depends on the likely effect of the ERA on the standards employed by the Supreme Court in evaluating gender discrimination in general under the Fourteenth Amendment.

Gender classifications in general are subject to an intermediate test. This test is less demanding than the strict scrutiny applied to classifications which are based on the suspect criteria of race, religion and, with some exceptions, alienage. It is more demanding than the rational basis test which is applied to state legislation in general. This intermediate test requires that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." Further, "[t]he burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982) (O'Connor, J.); See Craig v. Boren, 429 U.S. 190 (1976). As phrased in Kirchberg v. Feenstra [450 U.S. 455, 461 (1981)], the test is whether the state law "substantially furthers an important government interest." In Michael M. v. Superior Court [450 U.S. 464, 469 (1981)], the Supreme Court explained the rationale of this intermediate test:

> Underlying these decisions is the principle that a legislature may not "make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class." (Parham v. Hughes) . . . . But because the Equal Protection Clause does not "demand

> that a statute necessarily apply equally to all persons" or require "things which are different in fact [to] be treated in law as though they were the same" [Rinaldi v. Yeager]. . ., this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. . . . As the Court has stated, a legislature may "provide for the special problems of women." (Weinberger v. Wiesenfeld)

The Court in Michael M. upheld against a Fourteenth Amendment challenge a California statute which makes men alone liable for an act of unlawful sexual intercourse with a female. It is clear, therefore, from Michael M. that the intermediate test is not a rigid interdiction against all gender classifications. Rather, as Justice Stewart noted in his concurring opinion:

> The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born. Thus, detrimental racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated. . . . By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes. In this case we deal with the most basic of these differences: females can become pregnant as the result of sexual intercourse; males cannot. [450 U.S. at 477-78]

In Rostker v. Goldberg [453 U.S. 57 (1981)], arguments for heightened scrutiny were unavailing with respect to Congress' decision to implement draft registration only for males. In Heckler v. Mathews, 104 S. Ct. 1387 (1984), the Supreme Court upheld a Social Security spousal benefit provision despite the fact that it temporarily revived for equitable purposes a gender classification previously held unconstitutional in Califano v. Goldfarb [430 U.S. 199 (1977)] The Court in Heckler said that a governmental classification based on gender will be upheld only if the government meets the burden of "(A) showing a legitimate and 'exceedingly persuasive justification' for [a] gender-based classification" and "(B) demonstrating 'the requisite direct, substantial relationship' between the classification and the important governmental objectives it purports to serve." [104 S. Ct. at 1398] In assessing the legitimacy of the governmental objective, the opinion made it clear that the primary test for legitimacy would be an objective not in any way premised on "archaic and overbroad generalizations about the rules and relative abilities of men and women." [104 S. Ct. at 1401]

It is evident, therefore, that at the federal as well as state level, the intermediate test is not an automatic warrant for invalidation of gender classifications. At the same time, however, it is clear that the intermediate test does indeed mandate a heightened and rigorous level of scrutiny. Thus, in Mississippi University for Women v. Hogan [458 U.S. 718 (1982)], the Supreme court held unconstitutional a state policy of excluding men from the Mississippi University for Women School of Nursing. The governing principles were spelled out in the majority opinion of Justice O'Connor:

> That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. . . . Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. . . . The burden is met only by showing that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."
>
> Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. . . . If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. [458 U.S. at 723-26]

It is clear that the Equal Rights Amendment would require that gender classifications be evaluated under a standard at least as severe as the strict scrutiny applied to such suspect criteria as race and religion. This was explained in the definitive article by Brown, Emerson, Falk and Freedman, "The Equal Rights Amendment: a Constitutional Basis for Equal Rights for Women," 80 Yale L.J. 871 (1971):

> "The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other." (p. 889) ". . . the principle of the Amendment must be applied comprehensively and without exceptions." (p. 890)
>
> "Only an unequivocal ban against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment." (p. 892) ". . . prohibition against the use of sex as a basis for differential treatment applies to all areas of legal rights." (p. 891) ". . . From this analysis it follows that the constitutional mandate must be absolute." (p. 892).

There seems little doubt that the ERA would require the courts to employ an effects test rather than the usual Fourteenth Amendment test that would invalidate legislation only if it were intended to impose an unconstitutional classification. It is clear, for instance, that the ERA would overrule Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 260 (1979), where the Court upheld a Massachusetts veterans' preference law which had a disproportionately adverse impact on women, but which was held not to have "been enacted for the purpose of discriminating against women."

Under a disparate impact standard, that is, an effects test, the validity of prostitution laws would be called into question. In Commonwealth v. King, 372 N.E.2d 196 (Mass. 1977), although recognizing that the state ERA required application of a compelling state interest test to gender-based classifications, the court dismissed as 'unconvincing' the argument that discrimination exists because "most prostitutes are women and most customers men." 372 N.E.2d at 204 n. 10. Strict scrutiny therefore was not applied. However, the court said that the state may not enforce the sex-neutral prostitution law "against female prostitutes but not against male prostitutes unless it can demonstrate a compelling interest which requires such a policy." Commonwealth v. King, 372 N.E.2d 196, 207 (1977) [See testimony of Prof. Judith Welch Wegner, University of North Carolina School of Law, before the Subcommittee on the Constitution, U.S. Senate Judiciary Committee, April 23, 1984, p. 8] Under most prostitution laws, in practice, providers but not patrons are prosecuted and this disparity would not seem to be justified by the reasoning of Michael M. v. Superior Court [450 U.S. 464 (1981)]. "While the result is by no means clear, in view of traditional deference to state judgments concerning the appropriate scope of exercises of the police power, prostitution statutes of the sort described are nevertheless more susceptible to challenge under an ERA which embodies a disparate impact standard than otherwise. Assuming a successful challenge, however, a court would likely invoke canons of construction calling for strict interpretation of criminal laws, and decline to extend criminal penalties to the class of patrons, while striking down a narrow prohibition on prostitution itself." [Wegner testimony, pg. 9]

In the general area of criminal law, the heightened scrutiny required by the Equal Rights Amendment would at least call into question the validity of state criminal laws based on distinctions between the sexes. These could include "seduction laws, statutory rape laws, alws prohibiting obscene language in the presence of women, laws designed to protect women from being forced into prostitution, laws against homosexual marriages, and the Mann Act (federal white slave traffic). Senator Orrin G. Hatch, The Intelligent Woman's Guide to the Equal Rights Amendment, 12; see also, Barbara Brown, Thomas I. Emerson, Gail Falk and Ann E. Freedman, "The Equal Rights Amendment," Yale Law Journal, Vol. 80, No. 5 (April, 1971), pp. 871-986.

In the 1976 analysis by Anne K. Bingaman, "A Commentary on the Effect of the Equal Rights Amendment on State Laws and Institutions," prepared for The California commission on the Status of Women's Equal Rights Amendment Project, the author convincingly suggests that the Equal Rights Amendment would be likely to invalidate a wide range of criminal laws and penal processes, such as the following:

> ". . . that women arrested and charged with crimes are released on bond on their own recognizance much more frequently than are men charged with similar crimes. (p. 49)
>
> ". . . female offenders benefit after arrest from the "chivalry" factor at work in the American penal system. The California statistics show that in 1970, the ratio of males to females arrested was 6 to 1; the ratio of males to females actually incarcerated was 21 to 1. Even allowing for the fact that women are arrested more frequently than men for non-violent crime, the [National Commission on Violence] concluded that judges treat women more leniently than men. (p. 55)
>
> "The 'chivalry' factor . . . appears to remain in the parole granting process. Although no statistics from parole boards are available to verify it, there is a very real possibility that women are treated more leniently by parole boards than men convicted of the same crime. (p. 57) If that is true, passage of an Equal Rights Amendment will render the application of different parole standards to men unconstitutional." (p. 57)
>
> "Quite obviously, an Equal Rights Amendment will require that the stated conditions of parole be the same for men and women parolees, as is generally the case today. The Equal Rights Amendment will also require that those parole conditions be equally enforced between men and women parolees, which is probably not done today. (p. 59)
>
> With respect to sentencing practices regarding juveniles, the "only solution which will satisfy the Equal Rights Amendment is to sentence boys and girls equally to prisons or reformatories. Sentencing practices based on the premise that girls are more subject to rehabilitation than boys will be unconstitutional under the Amendment." (p. 64)
>
> "The Equal Rights Amendment will require that reformatories which are now sexually segregated be integrated, except for sleeping, showering and dressing quarters. . . . Further, of course, all educational, recreational, and vocational programs must be opened to both boys and girls without regard to sex." (p. 66)
>
> "Regarding the requirement that guards be the same sex as their prisoners, the right of privacy qualification to the Equal Rights Amendment should allow states to use only female guards to search female prisoners and only females to guard women inmates who are showering or asleep. However, all public areas of the prisons, as well as those sexually segregated areas which are not being used by inmates for personal bodily functions, may be guarded by persons of either sex." (p. 68)
>
> "In most state prisons, male prisoners are required to wear standard prison uniforms, while female prisoners are allowed to wear clothes of their own choosing which they bring to prison with them. Prison administrators believe that uniforms have an important psychological effect and tend to induce a lack of identity and self respect. The

> Amendment will require, of course, that male and female prisoners be treated alike with regard to wearing apparel." (p. 75)
>
> "Most state prisons do not allow male prisoners to use personal bedspreads, curtains or other decoration for their cells. Women prisoners, on the other hand, are allowed to freely decorate their cells as their personal tastes dictate. (pp. 75-76)

The recent experience under Equal Rights Amendments adopted in state constitutions is instructive on the likely impact on state criminal law of an Equal Rights Amendment to the United States Constitution. [See generally, Antonia M. Greenman, Women's Rights and State Legislatures (American Family Institute, 1980)] The analysis by Jordan Lorence for the Minnesota State Senate General Legislation and Administrative Rules Committee is worth quoting at length in the connection:

> State ERAs have generated a lot of court challenges by male sex criminals, trying to overturn criminal sex laws because only men can perform the crimes, not women. [See 90 ALR.3rd 158, 170]
>
> The courts have upheld forcible rape laws under ERA challenges in many states. [Colorado - People v. Green 183 Colo. 25, 514 P.2d 769 (1973) and 188 Colo. 113, 532 P.2d 953 (1975). Illinois - People v. Medrano, 24 Ill.App.3d 429, 321 N.E.2d 97 (1974). Maryland - Brooks v. State, 24 Md.App. 334, 330 A.2d 670 (1975). Montana - State v. Craig, 169 Mont. 150, 545 P.2d 649 (1976). Texas - Finley v. State, 527 S.W.2d 553 (Tex.Crim.App. 1975)]. Incest laws have been upheld except in one case, that treated father-daughter incest worse than other types. [Incest law struck down People v. Boyer, 24 Ill.App.2d 671, 321 N.E.2d 312 (1974) rev'd 63 Ill.2d 433, 349 N.E.2d 50 (1976). But see People v. Yocum, 31 Ill.App.3d 586, 335 N.E.2d 183 (1975)]
>
> Sex criminals rarely win their ERA cases, for several reasons. First, few people have sympathy for rapists, child molesters, etc. Second, if the courts struck down these laws, it would leave a significant hole in the state's criminal code.
>
> Third, and possibly most important, these laws are based on the physical differences between men and women. Women cannot rape men the same way that men can rape women. . . .
>
> Statutory rape laws have survived ERA test cases. Statutory rape laws punish older males who have sex with younger, minor females, even if the female consents to the intercourse. [See State v.

> Bell, 377 So.2d 303 (La.Super. 1979)] In Minnesota, the legislature repealed the traditional male-only statutory rape law in 1975 and replaced it with the sex-neutral statute. [See Michael M. v. Superior Ct. of Somona Cty.]
>
> Prostitution laws have been challenged in Massachusetts and Alaska under state ERAs. . . .
>
> The Alaska Supreme Court declared unconstitutional a law that made prostitution a crime only for females. The court struck the offensive language and said the desexed statute was acceptable under the state ERA. [Plas v. State, 598 P.2d 966 (Alaska 1979)]
>
> A Pennsylvania law that essentially set different prison sentences for men and women criminals was declared unconstitutional. [Commonwealth v. Butler, supra] This problem would not occur in Minnesota, because the sentencing laws are sex-neutral.
>
> Two laws dealing with juvenile offenders were declared unconstitutional under state ERAs. In an Illinois case, the court struck down a law that said 17-year-old males were to be treated as adults when charged with burglary, but not 17-year-old females. [People v. Ellis, 311 N.E.2d 98 (Ill., 1974)] In another case, a Texas court declared a law to violate the Texas ERA which punished 17-year-old males with confinement when charged with drunken driving, but not 17-year-old females. [Ex Parte Tullus, 541 S.W.2d 167 (Tex.Crim.App. 1976)] [Jordan Lorence, The Effects of the Proposed Minnesota Equal Rights Amendment (General Legislation and Administrative Rules Committee, Minnesota State Senate, January 3, 1983), 18-19]

The very least that can be said about the impact of an Equal Rights Amendment to the United States Constitution on state criminal laws and procedures is that it would result in a prolonged period of uncertainty. The uncertainty as to its reach is one of the main defects of the ERA in general.

We can be sure, however, that the ERA would require that gender classifications be subjected at least to the strict scrutiny that is now applied to classifications based on race and religion. Indeed, there is reason to believe that the ERA would mandate a test significantly more severe than strict scrutiny, since under the ERA discrimination would be expressly prohibited by a constitutional amendment adopted solely for that purpose. It is safe to predict also that the ERA would require the invalidation of state legislation and practices pursuant to an effects test which would tend to render unconstitutional many, if not virtually all, laws and practices with a disparate sexual impact.

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TESTIMONY
CARL C. HOFFMANN, Ph.D.
on the
EQUAL RIGHTS AMENDMENT
AND INCOME DIFFERENCES
before the
Subcommittee on the Constitution
of the
Senate Judiciary Committee

Thank you for giving me the opportunity to come before the Congress of the United States to testify on issues related to the Equal Rights Amendment. I have been engaged in statistical research on the income and occupational differences between men and women and blacks and whites for about seven years. Much of this research has been related to Title VII, the Equal Pay Act, and OFCCP matters both for the Courts and for administrative procedures. I am very pleased to present my views on this important issue.

I find it impossible to disagree with the principles of the Equal Rights Amendment: "That equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." There is no philosophical or moral basis for disagreement; in fact, consideration of sex as a criterion for any form of differential treatment under any law is as abhorrent to me as using race, religion, or national origin. Further, it is impossible to deny that differences exist between men and women in the workplace with respect to income, their occupations, and the patterns of their careers.

I am here, not because I disagree with the Equal Rights Amendment, nor because I believe there are no differences between men and women, nor because I feel that these differences are the way the world should be, but because I disagree with many of the arguments that are put forward in support of the ERA. From all the research that I have done, I can find no reason to believe that the passage of the Equal Rights Amendment will eliminate the income differentials or the sex segregation in occupations which presently exists. In terms of policy-making, I do not believe it will have the effect many proponents of the Equal Rights Amendment say it will.

I also strongly question whether we need an Equal Rights Amendment, especially with respect to employment discrimination and differences in earnings. Although I am not a lawyer, I wonder whether the Equal Rights Amendment is, in fact, a redundant piece of legislation. First, it seems to me that the 14th Amendment should fulfill the same goals as the Equal Rights Amendment, for it states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or endorse any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Although with a difference in economy of phrasing, it strikes me that the 14th Amendment is essentially the same as the Equal Rights Amendment; speaking of "persons", neither males or females, nor blacks or whites.

Second, with eloquence equivalent to both the Equal Rights Amendment and Article XIV of the Constitution, U.S. Code 2000, The 1964 Civil Rights Act states:

> "It shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

There have been many changes in the judicial interpretation of Title VII, especially since the Griggs v. Duke Power decision in 1971. The most damaging and potentially harmful change is the shift which places the burden of proof more heavily on the Plaintiffs in cases of alleged discrimination, specifically as demonstrated in Burdine.

Largely, however, the changes in both interpretation and complexity of the cases have followed a traditional social science line, which I will summarize, momentarily, in layman's terms. An article that I co-authored with Dr. Dana Quade of the UNC Department of Biostatistics discusses the increasingly sophisticated statistical arguments entertained by the courts, as well as a more responsive methodological approach to the fundamental questions involved. This has led to a great deal of frustration, especially from the Plaintiff's Bar, largely because the increased complexity and sophistication of the statistical showings have been combined with a shift of the burden from the Defendant, to rebut, to the Plaintiff, to prove. These two events have greatly increased the costs for both sides, but with devastating effect on the Plaintiff. Although a number of the cases I shall describe deal with race discrimination, their interpretation has equal impact on sex discrimination cases, for it is the causal factors leading to income, promotion, or termination differentials between blacks and whites and men and women which have been, to a large extent, the focus of Court decisions. I wish to concentrate here on these non-discriminatory causes of differences which the Equal Rights Amendment will not affect.

BACKGROUND: THE CASE LAW

For over twelve years, the courts have entertained statistical comparison in Title VII or employment discrimination cases. Starting with Griggs vs. Duke Power (1971), they have viewed statistical studies as one form of proof to raise an inference that allegations of discrimination may be correct. But during this period the level of sophistication of the arguments presented has increased tremendously, and correspondingly the level of sophistication of the statistics: from a point where simple internal maldistribution of an aggrieved class was held to be evidence of discrimination in Brown vs. Gaston County Dyeing Machine (1972), to a point where complex regression models used in Vuyanich vs. Republic National Bank of Dallas (1980) were referred to by the judges as "arcane". It is the purpose of this part of my testimony to review the development of the canons of proof for discrimination cases, much as one would review the literature in the social sciences.

Arguments used in courts to demonstrate discrimination must make relevant comparisons and must raise an inference of discrimination before they rise to the level of a prima facie case (Hazelwood School District vs. U.S., 1977, p. 308). The courts have held as incorrect the assertion that a case of discrimination can be premised upon a simple imbalance or disparity between various jobs or job levels of a company (EEOC vs. Radiator Specialty, 1979; EEOC vs. United Virginia Bank, Seaboard National, 1980; St. Marie vs. Eastern Railroad Association, 1981). In these cases the justices note that people cannot all be viewed as fungible for the purpose of determining whether members of a particular class have been unlawfully excluded. Increasingly, judges are looking for the causes of the disparities between men and women and blacks and whites. The essence of these decisions had an early summary in *EEOC vs. DuPont* (1977), where the court stated:

> "Statistics showing a higher percentage of blacks assigned to lower level jobs do not, in and of themselves, establish disparate impact on blacks. Without evidence of equal interest in various jobs, equal availability and equal qualification, the more reasonable inference would be that substantially more blacks than whites were willing to take the service worker jobs."

In the same case, the court also cautioned against undue reliance on selectively chosen data for analyses, and noted that the usefulness of statistical data "depends on all of the surrounding facts and circumstances." Legal decisions are based on the weight of all evidence, so statistical evidence must represent the whole. The Fourth Circuit's decision in *Roman vs. ESB* (1976) held, "We do not believe that isolated bits of statistical information necessarily make a prima facie case when divorced from other and contrary statistics and from the statistical picture of all the employment at the plant." The same circuit, elaborating the problems of specificity and generality in *Hill vs. Western Electric* (1979), advised that labor force studies ought to be specific to a part of a facility and to actions which have been found historically possible at that facility; and, in *Stastny vs. Southern Bell* (1980), said that the statistics ought to be specific to every subpart of an organization and not use a higher level of aggregation, which would obfuscate the actual employment process. The argument must also consider the union contracts that govern opportunity (*Teamsters vs. U.S.*, 1977). In the same year, a district court ruled in *Neloms vs. Southwestern Electric Power* (1977) that "The statistics used to buttress a claim should relate to the particular employment practice at issue. For instance, if the plaintiff is attacking hiring policies, he should show the disparity in hiring rather than statistics concerning the general composition of the labor force" (see also *Crocker vs. Boeing*, 1977).

Another concept raised by the courts is that of developing an inference of discrimination. To make this inference, a showing must be made of "long lasting and gross disparities" (*Teamsters vs. U.S.*, 1977; *Hazelwood School District vs. U.S.*, 1977, p. 307) or "a pattern significantly different from that of the pool of applicants" (*Albemarle Paper vs. Moody*, 1975). The courts have translated this interest in determining gross disparities to statistical terms and made analogy to statistical tests for analyzing the results of supposedly random selection procedures. The courts have required that the observed results of an employer's practices be at least two to three standard deviations away from the expected results of a random selection process before they are sufficiently significant to raise an inference of discrimination (*Hazelwood School District vs. U.S.*, 1977, p. 308; *Castaneda vs. Paretida*, 1977; *Garrett vs. R.J. Reynolds*, 1978). Recently, the Fourth Circuit has accepted the statistical concept that the null hypothesis can be rejected but not proved, in *EEOC vs. American National Bank* (1981), where Judge Phillips states:

> "If a legal rule of analysis can properly be derived from the *Castaneda* footnote, it can only be that standard deviations greater than two or three necessarily exclude chance as a cause of underrepresentation. The converse of this -- that standard deviations of not 'more than two or three' necessarily exclude discriminatory design as the cause -- is nowhere implied."

Finally, the time of acts of discrimination must now be taken into account, not just the process. The court's ruling in *United Airlines vs. Evans* (1977) implies that discriminatory acts occurring prior to 180 or 300 days before the earliest charge of discrimination are merely unfortunate events in history which have no present legal consequences. As Schlei and Grossman (1979, p. 316) note, "The 'present effects of past discrimination' theory of showing discrimination has been substantially limited by the Supreme Court's decision in *Teamsters* and *Evans*." This is echoed by Judge Phillips in *EEOC vs. American National Bank* (1981), in stating how to eliminate continuing effects:

> "This may be done in two basic ways: by focusing on the static work force statistics and purging them of all pre-Act employment actions so that only post-Act actions remain for assessment; or, more commonly, by focusing on post-Act employment decisions, . . ."

In sum, court decisions have clearly delineated the following parameters of proof for statistical evidence. (1) The statistics should describe particular employment practices and if possible the acts of hiring, promotion, evaluation, termination, etc. (*Neloms vs. Southwestern Electric Power*, 1977). (2) Statistics, while specific to process and acts, should be generalizable and representative of the population subject to acts (*Roman vs. ESB*, 1976). (3) One must consider the qualifications of employees (*EEOC vs. Radiator Specialty*, 1979). (4) One must consider the organizational situation (*Hill vs. Western Electric*, 1979). (5) One must consider employees' preferences (*EEOC vs. United Virginia Bank, Seaboard National*, 1980). (6) One must consider the availability of individuals in terms of their ability to follow through on their interests and qualifications (*Pennsylvania* *vs. Lucas*, 1979; *U.S. vs. Fairfax County*, 1980). (7) One must consider labor agreements and the rules of the organization (*Teamsters vs. U.S.*, 1977). (8) One must consider the history of a facility and how practices have changed over time (*Paxton vs. Union National Bank*, 1981; *Teamsters vs. U.S.*, 1977). (9) The act must generate long-lasting, gross, or significant disparity (*Teamsters vs. U.S.*, 1977). (10) The statistics must refer only to acts or processes which have occurred within a fixed time period (*United Airlines vs. Evans*, 1977).

It is clear from the evolution of case law under Title VII that the problems of discrimination in the workplace are complex, and not as simplistic as a simple comparison of earnings between men and women. I feel many of the causal factors that have been recognized by the courts as valid non-discriminatory reasons for differentials in pay and promotion between men and women are correct. In addition to these, the court (*EEOC v Aetna Insurance*, 1980) has taken external market conditions into consideration for differentials in pay between men and women. In that case a woman was paid less than a man to do the same job. However, because the woman was promoted from within and the man was hired from outside, the court ruled that the pay disparity was non-discriminatory, because a premium may have to be offered in order to attract new experienced employees away from other similar companies to a position at the same level into which the woman had been promoted. Further, it has been accepted that differences in behavior between men and women, such as willingness of men to negotiate salaries, or willingness of women to take lower salaries, are acceptable differences if the companies did not use that knowledge to treat men and women differently (*Horner v. Mary Institute*, 1980).

It is difficult for me to understand how the passage of the Equal Rights Amendment would affect the courts' interpretation of such causes as these for the differences in pay and promotion between men and women.

Some arguments for the Equal Rights Amendment include pointing to the strides made by blacks since the passage of the Civil Rights Act, and comparing them with the literal stagnation in the differences between men's and women's income over the same period. These advocates of the ERA state specifically that an amendment is required in order for women to achieve the same changes as blacks have achieved since the passage of the Civil Rights Act. Oft-cited statistics illustrate improvements in the ratio of average black male and female income to average white male income since 1960. Since 1965, when the Civil Rights Act became law, the average black male income has increased from 62.8% to 70.8% of the average white male income, and black females' gains have been even more substantial, going from 39.3% to 54% of the average white male income. However, white females' incomes

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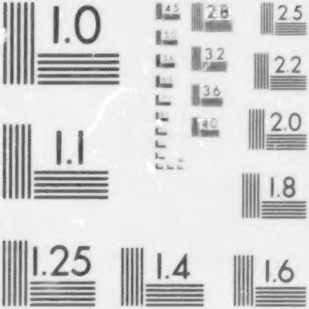
1.0
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MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS
STANDARD REFERENCE MATERIAL 1010a
(ANSI and ISO TEST CHART No. 2)

have remained rather stagnant, from 57.9% in 1965 to 59.8% in 1981, of white males'.

These figures lead many people to conclude that current laws are inadequate to solve the problem of sex discrimination, or to solve the problem of the unchanged income differentials between men and women. The results of much of my work argue rather that the mechanisms causing the differences in income between men and women are of a different type than those that caused the differences in income between blacks and whites. Specifically, I have found that the career choices, the socialization of women, the motivation of women on the job, and most importantly the structure of women's family lives, prevent them from following through on careers to the same extent that men can. Perhaps most striking is the data which I gathered in a survey done for a corporate client, which was later published in an article co-authored by Dr. John Reed of the University of North Carolina, entitled "Sex Discrimination? The XYZ Affair."

REVIEW OF THE "XYZ AFFAIR"

I would like to introduce a case study, reviewing briefly the findings reported in the XYZ Affair article. In 1978 I was asked by a company to study the differences in promotion rates between men and women. This company has certain highly desirable personnel practices: namely, they lack both unions and highly restrictive work rules; all jobs in the company throughout the nation are open to be bid upon by employees from any other position in the company; all applications for jobs are reviewed based on ability and not necessarily prior experience; all hiring is done on the basis of skills and potential ability; and there is no differentiation between management track, hourly track, and clerical track employees. All individuals are hired into entry level, non-supervisory, hourly positions, and are promoted from within. It has, therefore, almost a perfect internal labor market, where all information about jobs and job requirements are known to all those interested; and no penalty is exacted, in terms of transferring, for any particular longevity or seniority in a line of progression.

The company had the following problem: while women made up approximately 82% of a clerical workforce within the company, in 1978 they received only 74% of the promotions, and prior to 1978, only 61% of the promotions. There were no differences between men and women with respect to training, education, or experience that could explain the differences. Further, seniority was not a factor in the reason for promotions from hourly to supervisory positions. The criteria for promotion from hourly to supervisory positions are knowledge of the job, performance, and leadership. The company did not assert that these attributes were held differently by men and women. My company was hired to find out the reason for these differential promotion rates, which were that the female promotion rate was approximately 75% of the male promotion rate. What we found was this: as a proportion, twice as many men as women indicated a desire to be promoted. While roughly the same percentages of men and women were encouraged to seek promotion, 74% of the men so encouraged responded favorably to that encouragement, compared with 43% of the women. Despite the fact that roughly equal proportions of men and women were encouraged to seek promotion, only about half as many women as men actually requested promotions in the year prior to our survey, while historically three times as many men as women requested promotions. The responses of the company to these requests for promotion were equally favorable to both men and women. Within the year preceding the study, approximately 39% of the men and 21% of the women had either requested promotion or had responded favorably to the company's encouragement to seek promotion. Historically, those figures had been 46% of the men and 19% of the women. These figures are reproduced in Table I.

TABLE I. SELF-REPORTED PROMOTION-SEEKING BEHAVIOR, 1978 AND BEFORE[1]

	1978		1977 or Before[2]	
	Men	Women	Men	Women
Percent who requested promotion	28%	14%	30%	11%
Of those, percent reporting positive response	55	70	51	55
Percent asked whether interested in promotion	36	34	41	33
Of those, percent who expressed interest	74	43	69	35
Percent who indicated interest either way	39	21	46	19
(N)	(283)	(363)	(218)	(226)

1. Source: Hoffmann Research Associates survey of XYZ employees.
2. Asked only of respondents employed before 1978.

Since producing that report in 1978, I have duplicated these findings in cases involving very different occupations and very different industries, and have seen the same phenomena of differential behavior between men and women in at least two more situations where my company was acting on behalf of the Plaintiffs in sex discrimination lawsuits. Briefly, our findings were that men and women showed differential rates of certain behaviors which could be characterized as "promotion-seeking". Generally, men are very aggressive with respect to seeking promotions, even at the expense of the happiness of their families.

It is possible that this differential behavior is a function of the expectations that men and women develop as a result of the way they feel they are viewed by the company. I have already stated that the company solicited expressions of interest in promotion from equal proportions of men and women. Further, from our survey we noted that there was no differential perception of discrimination by men and women. Men and women reported similar opinions on the transfer and promotion policies and the promotion possibilities within the company. Further, when we asked individuals for their reasons for not being promoted, only insignificant percentages of both men and women blamed discrimination in any form. Some men, and many more women claimed that they were not promoted either because the company knew they were not interested or because they felt unqualified for the higher position (see Table II).

TABLE II. RATINGS OF XYZ PROMOTION POLICIES AND PERCEIVED REASON FOR NOT BEING OFFERED PROMOTION, BY SEX[1]

	Men	Women
Percent saying "good" or "excellent" —		
Transfer policy	72%	80%
Policy of promoting from within	68	70
"An individual's" promotion chances	43	42
Own promotion chances	34	29
(N)	(281)	(360)
Reasons for not being offered promotion —		
Discrimination	3%	1%
Known not to be interested	27	41
Personality, personal history	19	10
Not qualified	14	25
(N)[2]	(23[illegible])	(30[illegible])

1. Source: Hoffmann Research Associates survey of XYZ employees.
2. Asked only of those not offered promotion in 1978.

Unequal treatment or discrimination could have led to the disparity in aspirations between men and women. Perhaps the most pernicious form of unequal treatment is occupational segregation within a corporation, where positions are classified as "male" or "female" jobs, and women, regardless of their qualifications or preferences, are allocated to "female" jobs, while only men are assigned to the "male" jobs. Since the job we are examining is a female-dominated one, women may have been allocated to this department against their wishes, and treated fairly from then on. In the XYZ survey, we asked men and women if they had originally wanted the job they presently held in the company. Roughly 66% of the women, and only 45% of the men, said that they had, indicating that in this case, the women had the jobs they originally wanted, ruling out sex discrimination in job assignment.

In my work, I have examined many workforces and the applicant flow data of many companies, and the results consistently show that women tend to apply for sex-stereotyped, traditionally "female" jobs. Women tend by this process to find themselves perpetuating the stereotype. Further, once women are hired into these jobs, they may find to their frustration that they are locked into a particular career pattern, although this is not the case in the XYZ Corporation, since company work rules often discourage movement out of given lines of progression.

After the questions about initial job assignment, we asked men and women if they wanted a different job. More men than women were seeking other positions, about 67% of the men compared with 57% of the women. Of all those who said they wanted another position, 24% of the women chose other clerical positions, compared to only 10% of the men. Forty-two percent of the men wanted supervisory or marketing positions, compared with only 22% of the females. In questions eliciting employees' ultimate career aspirations, 39% of the women said that they would be satisfied in the positions they held, while only 21% of the men would settle for these positions. In response to questions about aspirations to upper-level management positions, roughly 46% of the men said they would like to be in the highest level supervisory, management, or executive positions while only 14% of the women responded in this fashion. In short, women's career ambitions were more limited than men's, for both immediate advancement and long-term achievements. This difference was evident at the time they were hired; it was not a result of practices or policies of the company. Table III summarizes these data.

TABLE III. PAST AND PRESENT ASPIRATIONS OF MALE AND FEMALE CLERKS[1]

	Men	Women
Originally sought present position	45%	66%
Would like different position	67	57
Other clerical position	10	24
Supervisor, Assistant Supervisor, Market Representative	42	22
Ultimate Aspirations:		
Present position	21	39
Supervisor, Assistant Supervisor	12	27
Chief Supervisor, Manager	25	9
Executive	21	5
Other and "don't know"	20	20

1. Source: Hoffmann Research Associates survey of XYZ employees.

One of the crucial career differences between men and women is the amount of time they can spend on a job. There are, unfortunately, only 24 hours in a day, and most of us require about eight hours of sleep. The other sixteen hours are generally divided among work, inside and outside of the home, and family responsibilities and recreation. The demands of supervisory and management positions are similar across most industries. XYZ Corporation was no different: both men and women believed that they would be required to spend more hours at work;

that their hours would be less flexible; and that it would become more difficult to find someone to fill in for them at work when they had demands at home. At XYZ Corporation there was a strong leadership position which required that supervisors arrive before their crew, leave after them, and be willing to perform any of the tasks usually assigned to the hourly workers. Further, as in supervisory positions in many companies, the initial pay increase is rather small: at XYZ the difference in pay between a clerk and his or her first line supervisor was only $6[illegible] a month.

Yet it must be remembered that women are usually saddled with a disproportionate number of tasks in the home. They are usually the caretaker at home, and are responsible for cooking, laundry, shopping, cleaning, attending to the "business" of the household and so forth. When there are children, it is usually the woman, and not the man, whose job must be flexible enough to free her to meet the children's needs and demands and to make adjustments for the children's welfare.

The time women must spend in these housekeeping and child care tasks usually does not vary according to whether or not they work outside the home. Essentially, the man who works, works one job; while the woman (especially if there are children present) works two. For a woman it is very difficult to have both a career and a family, while the opposite is true for a man: having a wife actually facilitates a man's ability to fulfill the demands of his career. A non-working wife, or one who works part time, allows the man tremendous flexibility in his response to the time demands of his job. All of his maintenance (food, clothing, social activities, and so on) is easily taken care of by the existence of the family; that is, the wife. He can devote large amounts of both energy and time to his career. This gives him a tremendous competitive advantage over both single men and women and married women, who must make compromises between their careers and other aspects of their lives. Perhaps this can be best summarized by some of the research that we have done for other companies.

In one company we found, somewhat to our surprise, that although women spend many more hours taking care of housework and meals, men often reported as much activity with their children as women did. After some work, we found that when these men go home after work, they play with the children and keep them occupied while their wife cooks the meal. This would account for daily involvement in the children's activities. However, when we asked further whether they could change their working hours to any shift, or whether added responsibilities would cause any interference with their household responsibilities, men said "no" — in fact, there was no relationship between the amount of time they spent with their children and their ability to adjust to the demands of the job. Clearly, if the job demanded more time, they would simply spend less time with their families. This was not the case for women: the more involved a woman was with her family, and the more time she spent with her children, the less likely she was to say that she could adjust to the time demands presented by a promotion.

The effect of marriage is illustrated by the figures in the following tables. We constructed an index of motivation for the XYZ Corporation report, in which employees were considered "highly motivated" if they aspired to higher level management, said they would give up a preferred shift schedule for a promotion, and had both the time and the ability to achieve the highest level supervisory position, short of Manager, in their line of progression. Sixty-one percent of the men surveyed fell into this category, while only 31% of the women did. We then combined this motivation index with marital status to produce Table IV.

TABLE IV. PROMOTION-SEEKING BEHAVIOR BY MOTIVATION FOR MALE AND FEMALE CLERKS, MARRIED AND UNMARRIED

	PERCENT SEEKING PROMOTION (N)	
	MEN	WOMEN
Low Motivation	16% (114)	16% (249)
Unmarried	14% (65)	20% (127)
Married	20% (46)	12% (122)
High Motivation	53% (172)	33% (124)
Unmarried	47% (88)	36% (61)
Married	60% (84)	30% (63)

There was no difference in promotion-seeking behavior between male and female employees whose motivation was rated as "low" -- 16% of men and women in this classification exhibited some form of promotion-seeking behavior. Marriage had no significant impact on this group's behavior, although unmarried women and married men exhibited slightly more promotion-seeking behavior than married women and unmarried men. However, there is a startling contrast between this group and those whose motivation was rated "high." The proportions exhibiting promotion-seeking behavior in the unmarried group are substantially greater than in the unmarried "low motivation" group, and the behavior here is roughly equal: 47% of the men and 36% of the women. But in the next row we find a stronger measure of the effect of marriage: 60% of the married men, compared with 30% of the married women, displayed promotion-seeking behaviors.

Although marriage is shown to have a dampening effect on highly motivated women (the rate of promotion-seeking behavior drops from 36% to 30%), the more significant difference is in the effect marriage has on men, increasing their rate of promotion-seeking behavior from 47% to 60%. As I mentioned earlier, I believe the fundamental reason for this difference is the allocation of time in the home and the primacy of the man's career. This is illustrated in Table V.

TABLE V. INDICATORS OF OCCUPATIONAL PRIMACY WITHIN FAMILY BY SEX (MARRIED RESPONDENTS ONLY)

	MEN	WOMEN
Would give up XYZ job if spouse's job required move	4%	53%
Spouse would give up job if respondent's job required move	92%	55%
Respondent's job more important to family than spouse's	90%	34%
Spouse's job more important	4%	50%

Marriage seems to have little effect on men's geographic mobility in this case. While the women were about equally divided on three of these four job primacy issues, almost all of the men indicated that their jobs were more important than their wives'. Yet there is no close correlation between job primacy and income: the average income of female clerks in this company was only about $400 a year less than that of their husbands, with 45% of the women earning more than their husbands. Other studies that we have performed indicated that even under conditions of roughly equivalent incomes, men have much more flexibility in adjusting to the demands of their jobs than women have. Often this flexibility is in expectation of job advancement.

We have found the same results in other companies, but the most striking examples occurred in two sex-discrimination cases in which we worked for the plaintiffs. Upon finding substantial disparities in income, as well as job segregation, we conducted further research. In both cases we found that to a great extent the differentials were due to the women's lack of interest in moving into male-dominated areas of the facility. In both cases involving manufacturing firms, women received, over the years, hundreds fewer promotions and transfers. Yet the Plaintiff found it impossible to find credible female witnesses to testify that they wished to move into the male-dominated jobs. It is the structure of the family and the home, combined with women's self-perception, that has a most profound impact on women in the workforce. Added to this, their prior socialization and their initial career choices often trap them in low-paying lines of progression, which contributes to the well-known income differentials between men and women. Discrimination is often not the cause of these differentials, and therefore it is not within the power of the Civil Rights Act or the Equal Pay Act to correct them. Behavioral differences between men and women in the labor force are being recognized increasingly by both social scientists and judges, as the review of the case law at the beginning of my testimony indicates.

IMPLICATIONS ON SOCIAL SECURITY BENEFITS AND RETIREMENT PENSIONS

Many of the inequities which plague retired women are direct results of the earnings differentials in the labor market. Smaller contributions to the Social Security system and to pension funds unfortunately follow women throughout their lives. This, combined with their greater longevity, often leaves women living for longer periods on smaller fixed incomes than men. I believe that there may be disparities and a lack of fairness, even injustice, in the Social Security system. I believe this is because the value of women in their contribution to the wealth and earnings of men has not been recognized. All my work indicates a tremendous advantage that a devoted spouse gives to a man's career. Clearly, the family is a precious resource, responsible for the both creation of wealth within the nation and for the upbringing, socialization and training of the next generation. Even when both parents work full time outside the home, the family responsibilities fall disproportionately on the woman, and to the extent that her contribution is ignored by the Social Security system, injustice is done.

It appears to me that Congress has the necessary power to rectify these problems, to legislate these injustices away, and to recognize the contribution of women to the creation of community wealth and of wealth within the family. Virtually all of my testimony here deals with the policy ramifications of the Equal Rights Amendment, and I believe that the Equal Rights Amendment will have very little impact on family structures and the income differentials between men and women.

But having disagreed with its proponents, I must also disagree with those who argue against the Equal Rights Amendment. I can not foresee any cataclysmic changes to the family unit resulting from passage of the Equal Rights Amendment. The family and its traditions function to support all of its members: its strength transcends the laws of men. The amendment can not have the ramifications in this area that many people fear.

OTHER AREAS OF CONCERN

First, I am concerned that some State and Federal laws still do not recognize the importance and the contribution of women to the creation of wealth and to the security of the family, leaving her welfare entirely dependent on the good will and good intentions of her husband, and on his ability to manage money and to look after her for her lifetime. The number of divorced and widowed women living in poverty in the United States demonstrates that this is clearly not realistic. I believe that Congress and the Administration should take an active role in recognizing the contribution made by women who work primarily in the home. The Justice Department, using the Fourteenth Amendment, ought to work to change the laws in states that do not recognize the woman's contribution to the creation of wealth and to the security of the family. This activity would be important to women throughout the country and most likely would raise the status of women. I believe that society has lost sight of the importance of the role of wife and mother. Rather than an ethic, there remains only the well-intended myth that every husband will take care of his wife for all the days of her life. My reading of the Fourteenth Amendment leads me to believe that it is sufficient, and should be used actively in support of women's rights.

I believe it is important for the Congress and the Administration to take an active role in support of women's rights. While to me the Fourteenth Amendment's first paragraph clearly indicates the equality of "persons" both male and female, I am not sure that most men and women hold the same opinion. Women's behavior in the labor force may be affected by their feelings of being second-class citizens, and the ambiguity of their situation of not being specifically guaranteed equality in the provisions of the most basic document guiding the laws of the United States. Active support and encouragement of women's rights by elimination of discriminatory laws and by active enforcement of the Civil Rights Act and the Equal Pay Act would send the message to women that they are in fact equal. This support, then, may itself eliminate many of the motivational differences that exist in the labor force today.

One of my fears about the Equal Rights Amendment is that it is a symbolic issue, and its passage would relieve Congress and the Administration of much of the motivation to change discriminatory laws and to enforce already existing laws that prohibit discrimination. Again, I believe that there is sufficient power in the Constitution and existing laws to change what is wrong. I see little reason for the inactivity of Congress and the Administration with respect to changing the Federal laws, Executive Orders, and Statutes that are discriminatory. Such active intervention on the part of Congress and the Administration would go a long way toward demonstrating to men and women that women are not considered second class citizens.

I would hate to see the substantive changes in the law dictated by the Federal Courts, because I believe the issues are of such a complex nature that they require a great deal of study, and legislative rather than judicial action. I would hate to see the primary motivator of Congress, to study these complex issues and to make these hard choices, removed simply by passage of the Equal Rights Amendment, which may be redundant and unnecessary. That is, I would hate to see the Equal Rights Amendment become an easy way out of a difficult problem.

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THE EQUAL RIGHTS AMENDMENT: ITS REVOLUTIONARY IMPLICATIONS

(Observations of former Senator Sam Ervin, of North Carolina, on this subject - June 1983)

Sexual Differences and Resultant Customs and Laws

While they are otherwise alike, there are fundamental physiological and functional differences between men and women.

These differences are of supreme importance. They empower men to beget children, and women to bear them; and thus perpetuate the existence of humanity on earth.

These differences have produced customs in living, and these customs have been implemented by laws.

Children are God's most helpless creatures. They require years of physical, intellectual, and spiritual nurture to fit them for life as adults.

To insure that children receive such nurture, customs and laws have created the institution of marriage, and assigned differing legal responsibilities to men and women who marry in respect to themselves, their spouses, and the children they create.

In assigning these differing legal responsibilities to them, the customs and laws have taken into consideration these things: (1) the circumstance that the husband's role in the creative process is temporary and non-disabling, whereas the wife's role is protracted, arduous, and at least temporarily disabling; and (2) the characteristics and capacities which generally distinguish husbands and wives from each other.

Consequently the customs and laws assign to husbands and fathers the legal responsibility to provide shelter, food, and other necessities of life for themselves, their spouses, and their children, and to wives and mothers the legal responsibility to make the shelter a home for themselves, their spouses, and their children, and to supply their children the essential nurture their infancy and early childhood require.

The faithful performance of their respective legal responsibilities by married men and women is vital to the development and advancement of the human race.

In addition to assigning these differing legal responsibilities to married men and women in respect to their marital affairs and relationships, the customs and laws exempt women from compulsory military service; impose on men the duty to defend the country when it is engaged in war with its enemies; and secure to widows a portion of their husbands' estates for their support after the deaths of their husbands.

Under American jurisprudence, women may marry or refrain from marrying. Except to the extent it exempts all women from compulsory military service, the customs and laws do not apply to women who do not marry. Millions of women, however, deem marriage an acceptable way of life, and marry, become wives and mothers and widows. The customs and the law implementing them afford substantial economic and legal protections to them and their children.

Until comparatively recent times, men monopolized most remunerative employments in the nation, and few occupations were open to women. As the years passed however, the United States witnessed many changes affecting both men and women in their economic and social lives. Multitudes of women entered the work force. Many of them are married women, who have abandoned homemaking either totally or partially for outside economic activities, and are contributing their earnings to the support of themselves and their families. Some of these married women manage to make homes for their families and also perform their outside economic undertakings. Some of them postpone accepting any outside employment until their children are rather mature.

One group of Americans maintain that the economic and social changes have outmoded the customs and laws and made them unnecessary; that the retention of these customs and laws are both insulting and injurious to all women because they deny them equality of legal rights with men and consign them to a status in society inferior to that of men; and that they should be supplanted in their entirety by new laws phrased in neuter terms and applying equally and uniformly and without variation to all men and women in all circumstances. This group includes many business and professional women whose legal rights are identical with those of men.

A second group of Americans, whom I believe to be right and to express views held by the vast majority of our people, reject these propositions on the ground that they are repugnant to reason and to the realities of human life in America.

They assert that the customs and laws recognizing that sex does exist and that it creates physiological and functional differences between men and women do not exalt or debase either sex. On the contrary, they simply recognize the truth that men and women complement each other in the activities essential to the existence and development of human life on earth.

They also insist that the roles in life of men and unmarried women and those of wives, mothers, widows, and immature children are drastically different and that it is idle thinking to assume that laws which suffice to protect men and unmarried women will offer adequate protection to wives, mothers, widows, and children. They also maintain that although the economic and social changes may minimize the need for the customs and laws in some instances, the conditions which originally brought them into being still exist throughout the nation, and that it would be folly to abolish them. To sustain this position, they say that multitudes of women still devote all their energy and time to homemaking and the care of their families; that even most of the women who have accepted outside employment devote a substantial part of their efforts to homemaking and the care of their families; that the need of children to receive the benefits of physical, intellectual, and spiritual culture from both of their parents is undiminished; and that the majority of widows are disabled by age, illness, or inexperience to earn their own livelihoods.

The Equal Rights Amendment

The first group of Americans demand that Congress and the State adopt the Equal Rights Amendment. This Amendment reads as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

Language uses words to express and communicate ideas. As a consequence, America's greatest jurist of all time, Chief Justice John Marshall, rightly ruled in the famous case of Marbury v. Madison[1] that the words of the Constitution must be interpreted to mean what they say.

Hence, both the Constitution and intellectual honesty compel us to determine the meaning and effect of the Equal Rights Amendment by its words. These words are as clear as sunlight in a cloudless sky.

The determinative words are set forth in its most crucial section, Section 1, which apply without exception or limination to the United States, the fifty States, and all men and women and boys and girls in them.

Although these determinative words state it in the negative, the Equal Rights Amendment has an affirmative meaning and effect.

If it should be added to the Constitution, the Amendment will impose on Congress and the fifty States absolute and inescapable constitutional obligations to make equal and uniform without any variation their respective laws relating to men and women and boys and girls, without regard to the physiological and functional differences between the sexes and without regard to the absurd impact those laws will have on men, women, or children in particular instances.

By so doing, the Amendment would require Congress and the fifty States to ignore the existence of sex in making laws to govern the conduct and relationships of those whom God has divided into two sexes, and to recreate men and women in a constitutional and legal sense as a new unisex of the neuter gender.

To accomplish this wondrous objective, the Amendment would rob Congress and the fifty States of the constitutional power to make any legal right or liability dependent on sex.

Discriminations may be made by law, or by nature, or by the mores of society. The Equal Rights Amendment is concerned with "equality of rights under law", and would not abolish any discrimination created against women by nature or the mores of society.

Some people really believe that God perpetrated an unjust discrimination on women when He placed on them the burden of bearing children and nurturing them in their infancy. If this be so, it is an unjust discrimination which the Equal Rights Amendment will not and cannot abolish. After all, the decrees of the Almighty cannot be nullified by human beings.

What the Equal Rights Amendment Will Do

As used in the Equal Rights Amendment, the words "equality of rights under the law" have a beguiling appeal and a deceitful power. Their beguiling appeal deters many persons from analyzing the Amendment and ascertaining what it says; and their deceitful power induces many others to believe that such a beautifully phrased Amendment cannot possibly mean what it says. Others are deluded into believing that the Amendment does nothing other than to proclaim an ideal which government is to seek to attain in future years.

For their own good and that of posterity, Americans must not be deluded by the beguiling appeal or the deceitful power of the siren words "equality of rights under the law," or by any misinterpretations of the Equal Rights Amendment.

If Congress should submit the Amendment to the States and the States should ratify it, the Amendment will operate as an inexorable command of the Constitution itself, and nullify every prior constitutional provision inconsistent with it, and invalidate all existing and future laws, federal and state, based on the reality that there are physiological and functional differences between the two sexes which God created to perpetuate human life on earth.

That is exactly what the Amendment would do if it is added to the Constitution.

This conclusion is mandated by the absolute words of the Amendment itself, and conforms to what its most knowledgeable advocates, Professor Thomas I. Emerson, of the Yale Law School, and Barbara A. Brown, Galk Falk, and Ann E. Freeman, able lawyers educated in the Yale Law School, say it will do. I quote their words as they appear in an article appearing in Yale Law Journal for April, 1971. They say:

> 1. The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women or men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other. (p. 889) . . . The principle of the Amendment must be applied comprehensively and without exceptions. (p.890)
>
> 2. Only an unequivocal ban against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment. (p.892) .... Prohibition against the use of sex as a basis for differential treatment applies to all areas of legal rights. (p.891) . . . From this analysis it follows that the constitutional mandate must be absolute. (p.892)
>
> 3. Our legal structure will continue to support and command an inferior status for women so long as it permits any differentiation in legal treatment on the basis of sex. (p.893) . . . Equality of rights means that sex is not a factor. (p.892)

If it is added to the Constitution, the Amendment will nullify all existing federal and state laws making legal distinctions between men and women, no matter how necessary and sensible such distinctions may be, and rob Congress and the 50 States of the constitutional power to enact any similar laws at any time in the future.

I cite below only a few of the things the Amendment will do:

-- The Amendment will nullify all laws of the Unites States or any State which exempt women from compulsory military service or from service in combat units of the armed forces in time of war.

-- The Amendment will nullify all laws of the United States or any State which grant exemptions or economic or social protections or benefits to women because they are wives, mothers, or widows.

-- The Amendment will nullify all laws of the United States or any State which impose on husbands and fathers primary responsibility for providing a home, food, or other necessities of life for their wives and children.

-- The Amendment will nullify all laws of the United States or any State which require husbands to pay alimony to their wives or former wives.

-- The Amendment will nullify all laws of the United States or any State which protect the privacy of men and women and boys and girls by requiring separate restrooms for the sexes in public and private schools, in public buildings or in mercantile establishments, and industrial plants.

-- The Amendment will nullify all laws of the United States or any State which permit segregation by sex in educational institutions or hospitals, or require segregation by sex in jails or prisons.

-- The Amendment will nullify all laws of the United States or any State which base the right to marry on the sex of the contracting parties, and deny the right to marry each other to female lesbians or male homosexuals.

-- The Amendment will nullify all laws of the United States or any State which define as crimes sexual offenses, such as forcible or statutory rape, which can be committed only by men.

Although it is absolute in its terms and is subject to no exception or limitation, whatever, some advocates of the Amendment say it will not strike down as unconstitutional laws making forcible or statutory rape crimes. They say this is so because these crimes are not based on sex, but are based on the unique physical characteristics which distinguish men and women from each other. Since these distinguishing physical characteristics divide men and women into two sexes, forcible and statutory rapes cannot possibly be exempt from the coverage of an amendment which outlaws all laws based on sex.

The partial recital of its inescapable consequences makes it manifest that the adoption of the Equal Rights Amendment would create constitutional and legal chaos in America. It would leave the nation without valid laws adequate to regulate the actions and relationships of men and women and the responsibilities they owe to the helpless children they create.

The Amendment recognizes this to be so by Section 2, which extends its effective date for two years to allow Congress and the States time to enact new laws to supplant those it nullifies. Fidelity to truth compels me to observe that the only new laws the Amendment would permit Congress and the States to enact would not suffice to give the country sensible government. Under the Amendment, they would have to ignore earth's most potent reality, that is, that sex creates physiological and functional differences between the two sexes, and undertake to regulate the inevitable consequences of the truth they are commanded to ignore by laws phrased in genderless language which does not denote the sex of any person to whom they apply.

Subject to the exceptions noted below, I will not indicate the nature of the new laws Congress and the States would be compelled to enact to supplant the customs and laws the Amendment would nullify.

Their nature is suggested with accuracy by the article in the Yale Law Journal for April, 1971. I urge all members of Congress and State Legislatures and all Americans who love our country to read and ponder what this article says on that subject.

The most militant organization of women supporting the Equal Rights

Amendment, NOW, is revealing to the nation in advance the absurd and unrealistic nature of the laws which the Amendment will command Congress and the States to enact if it is adopted.

NOW is doing this by calling on Congress to pass two pending bills, S. 372 and H. R. 100. These bills command insurance companies to ignore sex in setting rates on health insurance, and to require men and women to pay identical premiums for such insurance.

To comply with NOW's demand, Congress must ignore the economic truths that insurance is based on risk and that women under 55 years of age usually incur more health care expenses than men, and compel men to purchase for themselves personal maternity benefits God disables them to use.

If adopted, the Equal Rights Amendment would imperil our national security in a precarious world where potential foes indicate their ambition to extinguish all lights of liberty on earth and subject all mankind to their domination.

As the article in the Yale Law Journal clearly discloses, the United States would be compelled to choose between having no armed forces whatever, or having armed forces in which men and women would serve on exactly the same terms and precisely the same conditions. There could be no segregation by sex in barracks or on ships, or in training activities, or in combat.

In this connection, the article makes these two emphatic affirmations:

> 1. Distinctions between single and married women who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children. (No.14, p. 975)
>
> 2. Thus, if unmarried women are discharged for pregnancy, men shown to be fathers of children born out of wedlock would also be discharged. (No. 15, p. 975)

What has been said reveals that the constitutional scholar, Bernard Schwartz, was right in saying:

> Use of the law in an attempt to conjure away all the differences which do exist between the sexes is both an insult to the law and a complete disregard of fact. (Rights of the Person, Vol. 2, p. 538)

The Equal Rights Amendment Is Unnecessary

To the extent that the roles they enact in life are the same, the legal rights and the legal responsibilities of men and women should be the same. This is already true under most existing federal and state laws, and any discrepancies which may still exist do not require the drastic Equal Rights Amendment for their elimination. They can be removed by simple legislative acts.

Law ought not to make any invidious or unjust discriminations against women.

In its final analysis, the argument its advocates advance for its adoption is that the Equal Rights Amendment is necessary to abolish legal discriminations of this nature. If this be its real objective, the Equal Rights Amendment is totally unnecessary for three separate reasons.

The first of these reasons is that the Constitution now outlaws all invidious or unjust legal discriminations against women.

To be sure, the Supreme Court originally placed some absurd interpretations on the equal protection clause of the Fourteenth Amendment during the years following its addition to the Constitution. For example, it incorrectly adjudged that Illinois and Virginia were not disabled by the equal protection clause to deny qualified women the right to practice law. These and all kindred decisions are now as dead as the dodo.

Ever since it handed down Reed v. Reed[2] in 1971, the Supreme Court has consistently and rightly ruled that the due process clause of the Fifth Amendment, which applies to the United States, and the equal protection clause of the Fourteenth Amendment, which applies to the states, make every law, federal or state, that makes a distinction between the legal rights and legal responsibilities of men and women, null and void unless the distinction is based on reasonable grounds and is intended to protect women in some role they enact in life. Hence, the Equal Rights Amendment is not required to abolish any invidious or unjust discriminations against women.

The second reason why the Equal Rights Amendment is not required for this purpose is this: Virtually every law which in times past made invidious or unjust discriminations against women has been repealed or adjudged unconstitutional, and has been supplanted by new laws prohibiting discriminations of this nature.

As the United States Code discloses, Congress has enacted statutes during recent years prohibiting invidious or unjust legal discriminations against women in virtually every federal activity, and the like prohibition has been extended by statute or regulation to every state activity financed, in whole or in part, by federal funds.

There are few state activities which are not in this category, and virtually all of them are covered by state laws prohibiting invidious or unjust discriminations against women.

The third reason why the Equal Rights Amendment is not necessary to abolish invidious or unjust discriminations against women is this: Congress and the states possess plenary power under the existing Constitution to abolish such discriminations as may still exist.

Using a disastrous blunderbuss like the Equal Rights Amendment for this purpose would be as foolish as using an atomic bomb to get rid of a few mice. Legislators would be glad to abolish any remaning invidious or unjust legal discriminations against women if the advocates of the amendment would simply designate them.

I know of no invidious or unjust discriminations against women of substance other than those arising in employment, where some of them do not enjoy the pay, the promotion, and the other conditions of employment to which they are justly entitled.

But this is not the fault of law. As a matter of reality, existing laws prohibit virtually all of such discriminations. The Civil Rights Act of 1964 prohibits discrimination against women in employment in industries employing 15 or more persons if its business affects interstate commerce, except in those instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the enterprise. Hence, the Civil Rights Act of 1964 applies to every industry of consequence in the United States.

The Fair Labor Standards Act and the Equal Pay Act, which apply to every employer who has a single employee whose activity affects interstate commerce, command employers not to discriminate against women and to pay men and women equal pay for equal work.

Furthermore, the President and virtually all the departments and agencies of the federal government have issued orders prohibiting discrimination against women in federal employment. Moreover, state legislatures have adopted many enlightened statutes in recent years prohibiting discrimination against women in employment.

In the nature of things, the laws prohibiting discrimination against women in employment are not self-executing, and must be invoked in judicial proceedings by those who deem themselves aggrieved by their violations.

What has been said makes it manifest that Congress and the states have virtually abolished all laws making invidious or unjust discrimination against women, and that the claim that the Equal Rights Amendment is necessary to nullify any remaining laws of this nature is destitute of foundation.

This truth is not pleasing, however, to the most militant supporters of the Equal Rights Amendment. They are not really concerned with legal discriminations of this nature. Their objective is revolutionary in nature. Stated simply, it is to destroy all existing legal distinctions between men and women; and to rob Congress and the states of the constitutional power to make any legal distinctions between men and women in the future.

The Equal Rights Amendment Is Repugnant To The Realities Of Life

The Equal Rights Amendment is repugnant to the realities of life. What has already been said reveals why this is so, and may be epitomized for brevity's sake a second time as follows:

God created two sexes, and made physiological and functional differences between them. These differences enable men and women to perpetuate human life on earth. Forthright customs and laws are indispensable to these realities, and to the development of the children resulting from them. The Equal Rights Amendment undertakes to deny or defy these realities of life, and to regulate their consequences by absurd and unrealistic new laws phrased in genderless language which does not denote that they apply to the two sexes God created.

The Equal Rights Amendment is destructive of the system of government the Constitution was ordained to establish.

The Constitution is the wisest instrument of government the earth has ever known. This is so, in large part, because it embodies in a two-fold way in its provisions this aphorism of the British philosopher, Thomas Hobbs:

Freedom is political power divided into small fragments.

The Constitution divides the powers of government between the United States and the States by assigning to the United States all powers necessary to enable it to act as a national government for all the States, and by reserving to the States all other powers. Among the chief powers reserved to the States is the power to regulate the actions and relationships of the people residing within their respective borders.

Furthermore, the Constitution minimizes the threat of tyranny arising out of centralization of powers by separating the powers allotted to the United States among the Congress, the President, and the federal judiciary.

The reservation by the Constitution to the Statesof the power to regulate the actions and relationships of the people within their borders promotes good government and preserves liberty. No centralized government far removed from the people can be as sensitive or responsive to their needs as the government close to them.

In addition to vesting in the states and denying to Congress the power to define the legal rights and responsibilities of men and women residing within their respective borders, the Constitution empowers the courts of the states to determine the validity of their laws on this subject, except in the comparatively rare instances when they violate some of its specific provisions.

Section 2 of the Equal Rights Amendment specifies that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

If adopted, the Equal Rights Amendment would transfer from the fifty states to the centralized national government in Washington the power to regulate all the rights and responsibilities of men and women and their obligations to the children they create throughout the United States.

The judicial power of the states to determine the validity of their laws on the subject would shift immediately on its effective date from the state courts to the Supreme Court and the federal courts inferior to it.

While the amendment might be interpreted to permit the states to continue to legislate on the subject until Congress stepped in and took over, the amendment would transfer the ultimate legislative power on the subject from the states to Congress because the acts of Congress would nullify all inconsistent state laws by virtue of the supremacy clause of Article VI.

It is to be noted for the sake of clarity, however, that on its effective date Congress and the states would be robbed by the amendment of the constitutional power to pass any law making the legal right or liability of any person dependent on sexual differences between men and women.

This vast transfer of governmental power from the states to the distant and often insensitive national government in Washington would imperil both good government and liberty to an indescribable degree. Woodrow Wilson, a profound student of the Constitution, gave Americans this admonition:

> When we resist . . . the concentration of power, we are resisting the processes of death, because the concentration of power is what always precedes the destruction of human liberties.

The Support For the Equal Rights Amendment

Support for the Equal Rights Amendment is derived from an odd combination of persons whose motives for advocating it are irreconcilable.

The majority of its advocates do not understand what it means and will do; whereas the minority of its advocates do understand what it means and will do.

I digress momentarily to comment on what one of its most distinguished supporters in the Senate was recently reputed by the press to have said when he appeared before the Senate committee considering a resolution to submit the proposed amendment to the states again. On being interrogated by members of the Senate concerning his opinions as to what the amendment would do, he declined to answer their questions, and undertook to justify his action in so doing by saying the questions were not relevant to the legislative obligations of Senators, and could only arise properly after the amendment was adopted, and the Supreme Court was required in the exercise of its judicial duty to interpret it.

I end my digression by observing that the distinguished Senator's reputed statement recalled to my mind this observation I often made to high school students who visited my office during my years in the Senate:

> All of the queer animals in Washington are not in the Zoo;
> some of them are in Congress.

The attitudes and motivations of the majority and minority advocates of the Eqoal Rights Amendment are incompatible.

The majority of its advocates are not learned in the Constitution and the laws. They cherish the Constitution as an instrument of government. They simply dislike some of the requirements of some of the customs and laws relating to men and women; think that these requirements make invidious or unjust discriminations against women; and believe that the Equal Rights Amendment offers a benign way to abolish these invidious and unjust discriminations without impairing the Constitution they cherish.

The minority of the advocates of the Equal Rights Amendment know what it means, and what it will do. They idolize the concept embodied in the words "equality of rights under the law", and abhor the existing customs and laws because they frustrate the practical consummation of this concept by taking sex differences into consideration and establishing differing legal rights and responsibilities for married men and women in respect to themselves, one another, and their children, and differing legal responsibilities for all men and women in respect to military services to the country both in war and in peace. Moreover, they maintain that these customs and laws frustrate the practical operation of the concept of equal rights under the law by giving widows economic protections they do not extend to other persons.

The minority of the advocates of the amendment support it because it will abrogate the existing customs and laws, and make a revolutionary change in the Constitution to disable all legislative bodies in the nation to validate any comparable customs or enact any comparable laws in the future.

Candor compels me to assert that years of study of what advocates of the Equal Rights Amendment have said in its support have not revealed a single rational reason why the structure of our government should be altered in the revolutionary fashion the amendment contemplates, or a single rational reason why wives, mothers, widows, and children should be robbed of the legal and economic protections existing customs and laws secure to them.

I am constrained to suggest that those who advocate abolishing the primary legal responsibility of fathers to support the children they beget, as advocates of the Equal Rights Amendment do, ought to read and ponder verses 3 to 6 of chapter 18 of the Gospel According to Matthew, which declares that it would be better for a person who offends a child if a great millstone were hanged about his neck and he were drowned in the depth of the sea.

Since American jurisprudence extends to all women the option of marrying or refraining from marrying, there is no place in the Constitution for an amendment, such as the Equal Rights Amendment, which is deliberately designed to penalize women who choose to marry by robbing them, in the name of a specious "equality of rights under the law", of the legal rights and economic protections existing customs and laws give them as wives, mothers, and widows.

The support of both segments of the advocates of the amendment is based on America's great delusion that all the problems of life can be solved easily, quickly, and finally by amending the Constitution or by passing a law. Most of life's problems are not susceptible to a solution of this character.

As a general rule, their solution is to be found in religion, ethics, and morality. Problems arising out of relationships between human beings must ordinarily be solved by mutual understanding and cooperation on their parts.

The problems arising out of the initimate relationships between husband and wife can be solved only by love.

Notwithstanding these truths, many politicians give a speedy response to the demands of constituents for a constitutional amendment or a new law without pausing to ask or answer these relevant questions:

1. Is there really a problem which demands solution?

2. If so, is the problem one which is susceptible of solution by a constitutional amendment or a new law, or must it be solved in some other way?

3. Will the proposed constitutional amendment, if adopted, or the proposed new law, if enacted, create more serious problems than the problem it is devised to solve?

Advocates of the Equal Rights Amendment assert that its adoption would easily, quickly, and finally solve all the problems which life brings to women. They are simply deceiving themselves. If the Equal Rights Amendment were adopted, life would continue to bring to women all of the problems it has always brought to them. But all legislative bodies throughout the nation would be imprisoned in the constitutional straitjacket of the amendment, and would be rendered powerless to correct any of these problems by bestowing solely upon women benefits or protections, no matter how necessary or sensible the bestowal of such benefits or protections would be.

The History of the Equal Rights Amendment Before Its Submission to the States

The history of the beguilingly and deceptively phrased Equal Rights Amendment is intriguing.

The amendment originated about 1923. For some years thereafter some women based in the City of Washington, who called themselves The National Woman's Pary and lobbied for legislation for women, sought in vain to persuade Congress to submit it to the states for their consideration.

At that time organized pressure groups were virtually nonexistent; lobbyists were genteel; and members of Congress did their own investigating and thinking, based their official decisions on basic principles, and sought power and influence by courageous and intelligent leadership. Congress recognized that the Equal Rights Amendment was a well-intentioned proposal of highly devastating potentialities, and for many years courageously and wisely refused to submit it to the states.

After a proneness to appease because prevalent in Congress, a Senate committee reported the proposed amendment. When it was read in the Senate, Carl Hayden, a wise Senator from Arizona, recalled a state law which forbade the employment of women in the deep copper mines of Arizona and submitted a penciled amendment providing, in essence, that the Equal Rights Amendment should not invalidate any laws which gave special protections or exemptions to women.

The Senate unanimously adopted Senator Hayden's amendment, and the advocates of the Equal Rights Amendment refrained at the time from further action because they realized that it would thwart their efforts to abolish all legal distinctions between men and women.

This event was repeated in the Senate on other occasions, and gave rise to a demand of the advocates of the Equal Rights Amendment that it be approved without the Hayden or any other amendment.

After these events advocates of the Equal Rights Amendment persuaded some nationwide organizations of women possessing enormous political power that the amendment would liberate women from all troublesome legal problems, and induced them to adopt the amendment without change as their legislative goal.

It may be an unfortunate day for the United States for politically powerful groups to accept the enactment of any law or the adoption of any constitutional amendment as their legislative goal. This is because their zeal for victory may deter them from investigating and understanding the injurious consequences to the country of that which they seek.

This has been true in respect to the Equal Rights Amendment. As a general rule, those who advocate its adoption invoke as reasons for its advocacy court decisions that have been overruled; and laws that have been repealed or adjudged unconstitutional; and mistakenly assert that laws affording protection to wives, mothers, widows, and helpless children constitute inviduous or unjust discriminations against all women. Moreover, they will not take the energy or time to ascertain that Congress and the states have already abolished virtually all inviduous or unjust discriminations made by law against women.

One of the disturbing facts of life is that in a controversy between knowledge and ignorance, knowledge is in peril because it is limited, whereas ignorance is unlimited.

The House passed H. J. Res. 264 embodying the Equal Rights Amendment in 1970. After that event, Robert Sherrill, the distinguished journalist, remarked:

> The equal rights amendment's journey down the corridors of Congress has so far been an impressive demonstration of what can be achieved through almost total ignorance.

I made several speeches advising the Senate what the amendment means and would do when the Senate considered H. J. Res. 264 in October, 1970. In one of them I deplored the tragedy that the amendment would rob mothers of legal rights and protections, and quoted the Yiddish proverb: "God could not be everywhere; so He made mothers." Several days later a body of supporters of the amendment demonstrated for it on a street in Washington. A lone dissenter marched beside them carrying a placard bearing the words: "God could not be in the Senate; so He or She made Senator Ervin."

I offered amendment 1049 which stipulated that the amendment should "not impair any law of the United States which exempts women from compulsory military service." The Senate approved my amendment by 36 yeas to 33 nays on October 13. Shortly thereafter H. J. Res. 264 was laid aside by sponsors because the amendment's supporters implacably insisted that the conscription laws and all other laws had to apply to men and women without variation.

After the Senate approved my amendment exempting women from the draft and H. J. Res. 264 was abandoned, the most energetic advocates of the Equal Rights Amendment took pains to insure that Congress would be subservient to them the next time the Equal Rights Amendment was presented to it.

At their bidding, influential members of the women's organizations supporting the amendment visited the Senators and Representatives they knew and solicited their support. In addition, they established in Washington the most powerful lobby the capital of the nation had ever seen.

Their lobbyists visited Capitol Hill with a zeal comparable to that of the locusts which plagued Egypt in the days of Moses and Pharaoh.

They assured Senators and Representatives that the Equal Rights Amendment was a salutary proposal which would liberate all women from bondage to discriminatory law; that virtually all women in America favored it; and that those women would be highly pleased by members of Congress who voted for the amendment and highly displeased by those who did not.

By cajolery, they obtained pledges of support from members of Congress who deplore the intellectual labor of ascertaining for wthemselves what legislative proposals mean and will do, or Senators and Representatives who cherish unduly the good will of well-organized pressure groups. When a Senator or Representative indicated a reluctance to pledge his support to the amendment, they emphasized that they were merely asking him to vote to submit it to the states for their consideration and were leaving him free to oppose its ratification by the states if he afterwards concluded it to be unwise. If a Senator or Representative seemed obdurate to their entreaties for support of the amendment, they suggested to him that he would suffer reprisals at the polls.

While the lobbyists for the amendment were laboring in Washington, the overwhelming majority of all women in America went about their accustomed ways unaware that their existing and prospective rights and protections as wives, mothers, and widows were in peril in Washington. For this reason, no one in Washington lobbied against the amendment. Moreover, with rare exceptions, the press was indifferent to its obligation under the First Amendment, and made no substantial efforts to enlighten the nation concerning the meaning and devastating nature of the amendment.

When Representatives supporting it judged the time propitious, they introduced the Equal Rights Amendment in the House as H. J. Res. 208. Their judgment was unerring, and on October 12, 1971, the House passed H. J. Res. 208 without change by a vote of 354 to 24 and sent it to the Senate.

I was an independently minded Senator, who was not amenable to cajolery or threats. Besides, I must confess I was a legislative fool who rushed in where legislative angels feared to tread.

The Senate debated the House-passed Equal Rights Amendment in March, 1972. I remained on the Senate floor throughout the debate, fighting the amendment almost singlehandedly. I pointed out the devastating effects the amendment would have on the legal rights and protections of wives, mothers, widows, and children, and the drastic limitations the amendment would impose on the legislative powers of Congress and the states.

In addition, I introduced amendments to reduce the devastating effects the amendment would have if it should be adopted. I did not make many converts. The overwhelming majority of Senators had pledged themselves to vote to submit the amendment to the states, and absented themselves from the Senate floor during the debate. In obedience to their pledges, they marched into the Senate when the rolls were called, and rejected all of my amendments by margins abhorrent to reason.

They defeated by a vote of 77 to 14 my amendment providing the Equal Rights Amendment should "not impair the validity of any laws of the United States or any state which extend protections or exemptions to women." (Amendment No.1068)

They defeated by a vote of 72 to 17 my amendment providing that the Equal Rights Amendment should "not impair the validity of any laws of the United States or any state which impose upon fathers responsibility for the support of their children." (Amendment No. 1069)

They defeated by a vote of 79 to 11 my amendment providing that the Equal Rights Amendment should "not impair the validity of any laws of the United States or any state which assure privacy to men or women, or boys and girls." (Amendment No. 1070)

They defeated by a vote of 71 to 17 my amendment providing that the Equal Rights Amendment should "not impair the validity of any laws of the United States or any state which make punishable as crimes sexual offenses." (Amendment No. 1071)

They defeated by a vote of 78 to 12 my amendment, which was a substitute for the Equal Rights Amendment, providing that "neither the United States nor any state shall make any legal distinction between the legal rights of male and female persons unless such distinction is based on physiological or functional differences between them." (Amendment No. 472)

They defeated by a vote of 82 to 9 my amendment, which was a substitute for the Equal Rights Amendment, providing that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex. The provisions of this article shall not impair the validity of any laws of the United States or any state which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses."

By rejecting my amendments, the Senate guaranteed by its legislative history that the objective of the Equal Rights Amendment is to convert the two sexes created by God into identical legal beings having identical legal rights and identical legal responsibilities at all times and under all circumstances.

Having done this, the Senate passed the Equal Rights Amendment without change by a vote of 84 to 8 on March 22, 1972, and thus concurred with the House in submitting it to the states.

The seven Senators who joined me in voting against submission were Senators Bennett, Buckley, Cotton, Fannin, Goldwater, Hansen, and Stennis. They were noted for their indomitable political courage.

After all of my amendments had been rejected and shortly before the Senate's final vote, I made these extemporaneous remarks in the Senate:

> This is the most drastic proposal for amendment to the Constitution ever recommended or supported in the history of this nation. .... If it is .... ratified by the States ... the federal system, which contemplates an indestructible union composed of indestructible states, ... will be substantially destroyed, and all legislative powers relating to the manifold relations of men and women will be concentrated in the Congress of the United States. Not only that, but the ultimate power to interpret all the laws of this nature will be lodged in the federal courts to the exclusion of the states courts. ...
>
> (It) is ... bad ... to concentrate all power of this nature in the federal government, because nothing truer was ever said than the statement which Woodrow Wilson uttered on one occasion in which he said that when we resist the concentration of governmental power, we resist the processes of death because concentration of power always precedes the destruction of human liberties.
>
> I wish to pay tribute to the small band -- an exceedingly small band -- of stouthearted Senators who have shared my views in respect to the equal rights amendment and have supported my efforts to bring some degree of order out of the legal chaos which the amendment is likely to inflict upon our country. It is almost impossible to conceive the state of legal chaos which will ensue if this amendment is ratified by the States. It will invalidate thousands of laws which make legal distinctions between men and women, many of which are based upon entirely rational grounds and a recognition of the fact that God did create two sexes.
>
> These stouthearted Senators who have stood by me in this body sought in vain to make it certain that the equal rights amendment would not compel the Congress to subject women to compulsory military service when there was no necessity for so doing. They sought, and sought in vain, to make it certain that the daughters of America would not be sent into combat to die or to be maimed by the bayonets, the bombs, the bullets, the grenades, the mines, the napalm, the poison gas, and the shells of an enemy.
>
> They tried to make certain that the laws of the United States and the laws of the States which extend protections and exemptions to women in general and to wives and mothers, and widows in particular, which commonsense and reality and the experience of mankind have shown to be needful to enable them to perform their roles as wives and mothers, and to extend to helpless children the nurtures which they require in their infancy, and to give them the training necessary to their intellectual and spiritual development, were not outlawed by this amendment. They sought to do that in vain.
>
> They also sought to make certain that the laws which imposed upon husbands the primary obligation to support their wives, and upon fathers the primary obligation to support their children, would not be abrogated by this amendment. They also sought to do that in vain.
>
> They also sought to make certain that the laws of the United States and the laws of the States which secure privacy -- an invaluable right -- to men and women and to boys and girls would not be abrogated by this amendment. They sought to do that in vain.

> They also sought to make certain that mature men would not go unwhipped of justice if they seduce innocent and virtuous women under promises of marriage, or if they have carnal knowledge of immature girls under the age of consent, or if they transport women and girls in interstate or foreign commerce for the purpose of debauchery and prostitution. These stouthearted Senators also sought that objective in vain.
>
> The stouthearted Senators, who stood by me in this fight, and I have sustained an overwhelming defeat. But I believe that we have sustained this defeat under circumstances in which defeat serves better than victory to shake the soul and let the glory out. I say to those stouthearted Senators who supported me in this fight that they can lay to their hearts the satisfaction that they have not aided in an effort to crucify American womanhood upon the cross of dubious equality and specious uniformity. They have pursued this course because they cannot blind themselves to the proposition that when God created mankind, he created them male and female.
>
> I cannot vote for this resolution on final passage.
>
> I sincerely hope that the State legislatures will give serious consideration to all the arguments which have been made for the resolution and all the arguments which have been made against the resolution. I hope they will not agree to a constitutional amendment which would compel Congress to send my 5-year-old granddaughter on a subsequent occasion into combat with armed enemies of the United States where they are millions and millions and millions of men available to perform that duty.

Immediately after I yielded the floor, Majority Leader Mike Mansfield, a most gracious man, said:

> Mr. President ... may I extend my congratulations to the distinguished senior Senator from North Carolina, for the fight he has waged in all honesty, with deep conviction, and with great vigor.
>
> If this constitutional amendment is adopted in the Senate by a two-thirds vote, it will not be a catastropic defeat for the distinguished Senator; but if defeat there is, it will be an honorable defeat because he has stated his case with cogency and clarity, and he has waged the good fight for what he thinks is right, and perhaps history will prove him right. But, as the Senator has indicated, it is going to take three-quarters of the states to affirm or to approve what Congress will have done if this body this afternoon passes the constitutional amendment by a two-thirds majority, and that remains to be seen.
>
> I want to pay my deepest respects to the distinguished Senator not only for the fight he has waged, consistently and with clarity, but also for the fact that he is the only member of this body who, since we returned to the second session of this Congress on January 18, has been engaged in debate, day in and day out, without fail. He has been the first member to come into the Chamber, along with the joint leadership. Almost always he has been the last member to leave.
>
> So I commend the distinguished Senator for the remarkable physical stamina he has shown, and I honor him for the intellectual integrity he has displayed.

I now disclose what I learned from private conversations past numbering.

Many Senators and Representatives, who were pragmatic politicians, voted to submit the Equal Rights Amendment to the States notwithstanding they realized its true meaning and implications. To quiet their consciences, they laid the flattering unction to their political souls that they were voting to submit and not to ratify; that the states would ascertain the devastating nature of the amendment and refuse to ratify it; and that they could acquire or retain the good will of advocates of the amendment by passing the buck to the states and voting to submit the amendment to them without harming the country.

After all, pragmatic politicians resemble ~~the~~ God in one respect. They move in mysterious ways their wonders to perform.

The History of the Equal Rights Amendment After Its Submission To The States

The Constitution required the affirmative vote of 38 states to ratify the Equal Rights Amendment.

A number of state legislatures shared in the euphoria which the submission of the amendment gave to its advocates, and in consequence 22 states voted to ratify it by November, 1972, without making any real effort to determine its meanings or consequences.

Some patriotic and knowledgeable Americans, chiefly women, were alarmed by this trend. With meagre financial resources and virtually no aid from professional politicians, they assumed the formidable task of educating the American people and state legislators in respect to the true significance of the Equal Rights Amendment and what it would do to the legal rights and protections of women in general and wives, mothers, widows, and children in particular and how it would shift the legislative and judicial powers of the 50 states to Congress and the Supreme Court at Washington if it should be ratified.

These patriotic and knowledgeable Americans did an exceedingly good job. As a result, state ratifications of the Equal Rights Amendment slowed and finally ended altogether. Despite stupendous propaganda and threats, the advocates of the amendment induced only 35 states to ratify it, and five of the ratifying states rescinded their ratifications after they learned the truth about the amendment.

Advocates of the amendment undoubtedly deterred other states which had ratified from rescinding their previous action by their contradictory contention that states which had rejected the amendment could change their minds and ratify it, but states which had ratified it could not change their minds and reject it.

As a matter of constitutional truth, states falling in either of these categories have the power to change their minds and reverse their previous decisions until a proposed constitutional amendment has been actually added to the Constitution by the ratifying votes of three-fourths of all the states.

The congressional resolution submitting the Equal Rights Amendment to the states in 1972 limited the period for ratification to the ensuing seven years, the period habitually designated by Congress in such cases.

As the seven years were nearing their end, it became obvious that three-fourths of the states would not ratify the amendment before the deadline for ratification expired, and the then existing Congress, which was clearly subservient to the advocates of the amendment, took an action without precedent in the annals of the country. It undertook to extend the time for ratification for three additional years by majority votes of the members of its two houses.

The proposal to extend the time for ratification was considered initially by a Senate committee chaired by my good friend Senator Birch Bayh, of Indiana, the most eloquent champion of the amendment in the Senate. When I appeared before the committee in opposition to the proposal, I charged that the amendment would convert men and women into legal beings of the neuter gender, and propounded the rhetorical question: "Who would want to marry a being of the neuter gender." Senator Bayh responded: "I wouldn't." I retorted: "Birch, that's the most intelligent remark you've made since the committee met."

In extending the time for ratification, Congress repudiated Article V under which it had to act, and the decision of the Supreme Court in Dillon v. Gloss correctly interpreting that Article.

When it extended the period for ratification, Congress in reality submitted the amendment to the states a second time. It had no power to do so. Article V expressly requires a vote of two-thirds of each House of Congress as conditions precedent to submitting a proposed amendment to the states.

The Supreme Court rightly declared in Dillon V. Gloss[3] that the proposal of a constitutional amendment by Congress and its ratification by the states are not unrelated acts, but, on the contrary, are succeeding steps in a single endeavor; that a proposed amendment must be ratified by the requisite number of states within the period reasonably specified by Congress in the resolution submitting it; and that the states cannot vote upon it after that period unless Congress submits it to them "a second time."

The advocates of the amendment sought the extension of the time for ratification rather than a resubmission of the amendment to the states because they believed that ratifications made during the seven years specified in the original resolution would remain in effect during the extended period.

They were, I submit, indulging an idle hope. Virtually all state resolutions ratifying the amendment expressly conditioned their effectiveness on the requisite number of states approving it within seven years after 1972.

During the extended period of three years, advocates of the Equal Rights Amendment sought by propaganda and threats without precedent in the nation's history to induce other states to ratify it. Not a single state did so.

As the extended period was nearing its end, the States of Arizona and Idaho and numerous state legislators sought a declaratory judgment in the United States District Court for the District of Idaho decreeing that Congress had no power under the Constitution to extend the time for ratification of the amendment beyond the seven years originally designated by it, and that the five states had the power under the Constitution to rescind their original ratifying votes.

I filed an amici curae brief in the case in behalf of some state legislators, and was anxious for the presiding judge, Judge Marion J. Callister, Chief Judge of the United States District Court for the District of Idaho, to decide the case on its merits.

One of the defendants in the case, NOW, clearly indicated that it never wanted the Court to make a ruling on the merits, and convinced me that it ought to change its corporate name from NOW to NEVER. When it seemed to be feasible for Judge Callister to set the case for hearing on its merits, NOW habitually made a dilatory motion to prevent his so doing.

Finally, however, all of NOW's dilatory motions were adjudged, and Judge Callister made his ruling on the merits. In an opinion of surpassing excellence, he decreed that Congress had exceeded its constitutional power in extending the time for ratification of the amendment, and that the five states had merely exercised their constitutional power in rescinding their prior ratifying votes.

NOW and the other losing litigants appealed this ruling directly to the Supreme Court. Before the Supreme Court could pass on their appeals, the combined ten years allowed by Congress to the states for consideration of the amendment expired without three-fourths of them ratifying it, and the Supreme Court ruled that this event rendered the constitutional questions raised in the case moot.

Conclusion

When they framed and ratified the Constitution, the Founding Fathers contemplated that the United States would be a free and intelligent Republic. In the nature of things, they were compelled to entrust its future to the persons destined to exercise the governmental powers it ordains.

The Founding Fathers clearly contemplated that Senators and Representatives participating in amending the Constitution under Article V would be persons of political courage, intellectual integrity, and complete devotion to the country; and that their decisions on proposals to amend the Constitution would be made solely on the basis of the general welfare of the United States.

They certainly did not contemplate that Congress would vote to submit a proposed amendment to the states to aggrandize the political fortunes of its members, or to curry favor with organized pressure groups, no matter how powerful or well-intentioned those pressure groups might be.

About 1850, Thomas Babbington Macaulay, the wise British essayist, historian, and statesman, made this caustic comment concerning members of the British House of Commons:

> The members are more concerned about the security of their seats than about the security of their country.

The alacrity with which Congress made obeisance to the powerfully organized supporters of the Equal Rights Amendment and their lobbyists in submitting the amendment to the states and in extending the time for its ratification when it floundered engendered the fear in the hearts and minds of multitudes of Americans that Macaulay's caustic comment about the members of the British House of Commons now applies with equal truth to Senators and Representatives in the American Congress.

Notwithstanding the alacrity of Congress in these respects, and notwithstanding the untiring efforts of advocates of the amendment to induce such action by them by political pressures and economic threats previously unknown in America, the requisite number of states refused to ratify the Equal Rights Amendment within the combined period of ten years after the true meaning of its beguiling and deceptive words were exposed. The refusal of the states to ratify make it manifest to persons willing to face reality that the vast majority of all Americans who are informed on the subject are now opposed to the Equal Rights Amendment.

These illuminating events ought to enlighten advocates of the Equal Rights Amendment as well as Congress. Despite their illuminating power, however, unrelenting advocates of the amendment are ignoring them and demanding that Congress resurrect the repudiated amendment and submit it to the states again.

If it will courageously and intelligently reject this demand, Congress will do much to allay the fear of multitudes of patriotic and thoughtful Americans that Senators and Representatives are more concerned about the security of their congressional seats than they are about the security of our country.

The Constitution is the most precious instrument of government the earth has ever known. For years I have studied it and fought to preserve it for the benefit of all Americans of all generations. During those years, I have devoted much energy and time to the Equal Rights Amendment and its implications.

If I survive until September 27, 1983, I will be of the age of four score and seven years. [illegible]tical ambitions have vanished. I seek the political acclaim and support [illegible] person.

I have told the truth about the Equal Rights Amendment simply because I love my country. The same motive constrains me to make some concluding observations about amending the Constitution.

Constitutional amendments are "for keeps." Unlike ordinary laws, they cannot be easily repealed. Once adopted, they can be removed from the Constitution only by means of the amendatory process created by Article V. Consequently, a constitutional amendment, once adopted, may remain in the Constitution, and bless or curse America until the last lingering echo of Gabriel's horn tremblems into ultimate silence.

Congress and the states should act cautiously, advisedly, soberly, and without emotion when they are asked to add an amendment to the Constitution. They should never adopt an amendment unless it is calculated as well as intended to promote the general welfare of the United States. They should spurn all amendatory proposals, such as the Equal Rights Amendment, which are irrational or whimsical, irrespective of the political power and good intentions of those who advocate them.

In conclusion, I affirm that my protracted study of the Equal Rights Amendment and its disastrous implications has implanted indelibly in my mind these abiding convictions:

1. No Senator or Representative in Congress ought to vote to submit the amendment to the states unless he honestly believes that God made a mistake by creating two sexes to perpetuate human life on earth, and that the amendment constitutes an appropriate way to correct this mistake of God insofar as it is correctible by human law.

2. No member of a state legislature ought to vote to ratify the Equal Rights Amendment unless he honestly believes that he and his legislative colleagues are mentally incompetent to enact laws to govern the actions and relationships of men and women within the borders of their states, and that their existing constitutional power to enact such laws ought to be transferred from them to Senators and Representatives of the other 49 states sent to Washington to represent them in Congress.

Notes

1. Marbury v. Madison, (1803) 1 Cranch 137, 2 L.Ed.60.
2. Reed v. Reed, (1971) 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251.
3. Dillon v. Gloss, (1921) 256 U.S. 368, 65 L.Ed.994, 41 S.Ct. 510.

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MINORITY VIEWS OF MR. ERVIN

Is the Equal Rights Amendment to be the Tonkin Gulf Resolution of the American social structure?—Dr. Jonathan H. Pincus, Professor of Neurology, Yale Medical School.

I. INTRODUCTION

To abolish unreasonable and unfair discriminations against women is a worthy goal. No one believes more strongly than I that discriminations which society makes against women in certain areas of life ought to be abolished and they ought to be abolished by law in every case where they are created by law.

To stop discriminations against women we are considering Constitutional amendments which would abolish all legal distinctions between men and women. Therefore, the question to be resolved by the Senate is this: Should all laws which treat men and women differently be abolished and should the Federal government and the State legislatures be forbidden by the Constitution to pass any such legislation in the future?

Before we abolish all legal differences in the treatment of men and women to reach the admittedly unfair discriminations which do exist against women, I believe that we should consider the following questions:

1. What is the character of the unfair discriminations which society makes against women?

2. Does it require an amendment to the Constitution of the United States to invalidate them?

3. If so, would the Equal Rights Amendment constitute an effective means to that end? In other words, would the ERA reach areas in which the Congress does not really want to act?

It is the better part of wisdom to recognize that discriminations not created by law cannot be abolished by law. They must be abolished by changed attitudes in the society which imposes them.

II. DO WOMEN REALLY WANT THE EQUAL RIGHTS AMENDMENT?

One of the recurring myths that surround the equal rights for women amendment is the allegation that all women are for the amendment. This is not so.

The only detailed poll that has been taken on women's feelings on the equal rights question was done by Elmo Roper in September 1971. It is interesting to compare the feelings of women on specific subjects with what the sponsors of the equal rights amendment, including Congresswoman Griffiths, indicate will be the effect of the amendment.

a. In Elmo Roper's poll, 77 percent of the American women disagree "that women should have equal treatment regarding the draft." Yet, there is no doubt that all those interpreting the amendment believe that it will cause women to be drafted and to serve in combat. A *Yale Law Journal* article which the amendment sponsors, including Congresswoman Griffiths, have lauded as explaining how the amendment will work after passage says, "the amendment permits no exception for the military . . . Women will serve in all kinds of units, and they will be eligible for combat duty."

b. In Elmo Roper's poll, [illegible] percent of American women disagree that "a wife should be the breadwinner if better wage earner than husband." Yet, the supporters of the amendment in the *Yale Law Journal* say that "the equal rights amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex . . . child support sections of the criminal nonsupport laws could not be sustained where only the male is liable for support."

c. In the Elmo Roper poll, [illegible] percent of American women disagree that "a divorced woman should pay alimony if she has money and her husband hasn't." Yet, the supporters of the amendment say in the *Yale Law Journal* that "the equal rights amendment would not require that alimony be abolished but only that it be available equally to husbands and wives."

In interpreting these figures, it is important to remember that these large percentages of American women do not want the very things the ERA proposes. The primary sponsors of the ERA, including Congresswoman Griffiths, maintain that: A wife should have the legal responsibility for family support if she is the better wage earner; the alimony laws should apply equally to men and women with the result that a divorced woman should pay if she has the money; the draft laws should apply equally to men and women with the result that women will serve in combat.

So what we have with the equal rights amendment is a proposition that will destroy all legal distinctions between men and women and the majority of men do not want this and the majority of women do not want this.

III. UNFAIR EMPLOYMENT DISCRIMINATION

From the information given me by many advocates of the Equal Rights Amendment and from my study of the discriminations which society makes against women, I am convinced that most of the unfair discriminations against them arise out of the different treatment given men and women in the employment sphere. No one can gainsay the fact that women suffer many discriminations in this sphere, both in respect to the compensation they receive and the promotional opportunities available to them. Some of these discriminations arise out of law and others arise out of an absence of law.

When I sought to ascertain from them the specific laws of which they complain, the advocates of the Equal Rights Amendment have cited certain state statutes, such as those which impose weightlifting restrictions on women, or bar women from operating saloons, or acting as bartenders, or engaging in professional wrestling. Like them, I think these laws ought to be abolished. I respectfully submit, however, that resorting to an amendment to the Constitution to effect this purpose is about as wise as using an atomic bomb to exterminate a few mice.

Let me point out that Congress and the Executive Branch have done much in recent years to abolish discriminations of this character insofar as they can be abolished at the Federal level.

a. Under the Equal Pay Act of 1963 (29 USC 206) Congress made it obligatory for employers to pay men and women engaged in interstate commerce or in the production of goods for interstate commerce equal pay for equal work, irrespective of the number of persons they employ.

b. Under Title VII of the Civil Rights Act of 1964 (42 USC 2000) Congress decreed that there can be no discrimination whatever against women in employment in industries employing 15 or more persons, whose business affects interstate commerce, except in those instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of the enterprise. Just recently, the Congress has vastly extended the powers of the Equal Employment Opportunity Commission to enforce women's employment rights by allowing the EEOC to seek enforcement orders from the Federal District Court.

c. The President and virtually all of the departments and agencies of the Federal government have issued orders prohibiting discrimination against women in Federal employment, and have provided for affirmative action in the hiring and promotion of women.

Moreover, State Legislatures have adopted many enlightened statutes in recent years prohibiting discrimination against women in employment.

If women are not enjoying the full benefit of this Federal and state legislation and these executive orders of the Federal government, it is due to a defect in enforcement rather than a want of fair laws and regulations. Since the ERA is not self-enforcing, this defect in enforcement will survive the passage of the amendment, and women will still have to bring suits to enforce their rights in the employment sphere with no more remedies than they presently enjoy.

IV. EQUAL RIGHTS AMENDMENT UNNECESSARY BECAUSE OF THE 14TH AMENDMENT

A good case can be made for the proposition that it is not necessary to resort to a Constitutional amendment to abolish state laws which make unfair discriminations between men and women in employment or any other sphere of life. This argument rests upon the Equal Protection Clause of the Fourteenth Amendment which prohibits states from treating differently persons similarly situated, and is now being interpreted by the courts to invalidate state laws which single out women for different treatment not based on some reasonable classification.

To be sure, the Equal Protection Clause may not satisfy the extreme demands of a few advocates of the Equal Rights Amendment who would convert men and women into beings not only equal but alike, and grant them identical rights and impose upon them identical duties in all the relationships and undertakings of life.

It cannot be gainsaid, however, that the Equal Protection Clause, properly interpreted, nullifies every state law lacking a rational basis which seeks to make rights and responsibilities turn upon sex.

My view is shared by legal scholars. Their views on this subject are succinctly expressed by Bernard Schwartz in his recent commentary on the Constitution of the United

States which declares "that a law based upon sexual classification will normally be deemed inherently unreasonable unless it is intended for the protection of the female sex."

The best example of the Supreme Court's willingness to use the 14th Amendment to strike down laws which discriminate against women, thus rendering the ERA unnecessary, is the case of *Reed* v. *Reed*.

The Reed case

On November 22, 1971, the Supreme Court, in a unanimous decision, gave a strong indication that they would find all unreasonable sex-based classifications to be in violation of the equal protection clause of the 14th Amendment.

In the case of *Reed* v. *Reed*, 40 L.W. 4013 (1971), the Court found unconstitutional an Idaho statute requiring preference of male relatives over female relatives for appointment as administrators of an intestate's estate. The Court applied the constitutional test of reasonableness and found an "arbitrary preference established in favor of males." The Court continued by saying, "By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the equal protection clause."

A *New York Times* editorial on November 23, 1971, construed the decision to mean that:

"The effect of this ruling is to place the fate of various existing discriminatory laws on a case-by-case basis. This is a slower but preferable way to correct the evils of discrimination than the passage of the proposed equal rights amendment."

Professor Paul Freund of the Harvard Law School has the same view. He stated in a recent letter to me on the significance of the *Reed* case:

"In view of the *Reed* decision, however, I believe more strongly than ever that the subject should be left to be worked out under the equal protection clause, as are other questions of group classification. The equal protection guarantee, together with the ample legislative powers of Congress, is the best avenue to achieve meaningful equality of the sexes under law. This approach is greatly to be preferred to one that would force all the manifold legal relationships to men and women, from coverage under selective service to the obligation of family support, into a mold of mechanical unity."

Professor Phil Kurland of the Chicago Law School and Editor of the *Supreme Court Review* also wrote to me concerning the significance of the *Reed* case. Professor Kurland is convinced that the *Reed* case will pave the way for action by the courts and the legislature to rectify many of the admittedly unfair discrimination which confront women, but without the dangers resulting from an absolute Constitutional amendment. Professor Kurland said:

"But I am of the view that a sound program of legislative reforms would do more, especially under the mandate now received from the Supreme Court in *Reed* v. *Reed*, to eliminate more of the grievances that women have against their roles frequently imposed on them in our society. Legislation can get at specific problems in a way that no constitutional provision can."

I believe the *Reed* case indicates that the Supreme Court will act under the 14th Amendment to strike all discriminations of which women now complain and, therefore, I believe the *Reed* case renders the ERA unnecessary.

V. RECENT DEVELOPMENTS IN THE LAW

I firmly believe that recent case law illustrates very dramatically a statement made by Professor Freund last year. He said:

"It seems to me, incidentally, if the energy and dedication that have gone into the movement for the equal rights amendment over the past 40-odd years had been devoted to the selection and the sponsorship of test cases with respect to some of the unjust State laws that we have heard about this morning, a great deal more accomplishment would be shown with respect to the advancement of equal rights than we can boast of today."

Proponents of the equal rights amendment have frequently cited what they believe to be hesitance on the part of courts to deal with inequalities facing women. The Supreme Court particularly has received criticism on this score.

Yet this term the Supreme Court has heard several cases relating to sex discrimination. On October 19, 1971, the Court heard oral argument in a case challenging a provision of the Illinois Juvenile Court Act which regards unwed mothers as parents but does not consider unwed fathers as parents for the purpose of deciding who shall have custody of illegitimate children. *In re Stanley*, 256 N.E. 2d 814 (Ill. 1970), cert. granted, No. 70-5014. In upholding this provision the Illinois Supreme Court held that this is not a denial of equal protection because the distinction between the class of mothers and the class of fathers "is rationally related to the purposes of the *Juvenile Court Act*" (presumably to protect the best interests of the children). A case heard by the Court on December 7, 1971, involves the holding of the Louisiana Supreme Court that the absence of women on general venire lists for grand jury duty is not cause for quashing an indictment. *State* v. *Alexander*, 233 So. 2d 891 (La. 1970), cert. granted, No. 70-5026.

In a case already decided this term, the Supreme Court unanimously struck down an Idaho statute which required preference of male relatives over female relatives as administrators of intestates' estates. *Reed* v. *Reed*, 40 L.W. 4013 (November 22, 1971). I have discussed this case earlier at length. Chief Justice Burger, writing for the Court, quoted from *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920), to the effect that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed*, slip opinion, p. 5.

Last term the Court rendered a decision in a landmark case arising under Title VII of the Civil Rights Act of 1964. In the first sex discrimination case arising under Title VII to reach the Supreme Court, a Court of Appeals decision permitting a company to distinguish between women with pre-school age children and men with pre-school age children in hiring was reversed. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). The Supreme Court remanded the case for an evidentiary hearing in the District Court as to whether the family obligations of women with pre-school age children are so relevant to job performance that hiring or other employment distinctions based on the fact of a woman having pre-school age children are justifiable as a bona fide occupational qualification.

I think it is very obvious that the Supreme Court is not ignoring the issue of discrimination against women. Certainly the lower courts are tackling the question and usually deciding in favor of women's equality. Many successful employment discrimination suits have been brought under Title VII. For example, numerous state labor laws have been held invalid as being in conflict with Title VII's mandate for equal employment opportunity. A federal district court has held a California statute prohibiting female employees from lifting objects weighing 50 pounds or more to be in conflict with Title VII and, therefore, void. *Local 246, Utility Workers Union of America, AFL–CIO* v. *Southern California Edison Co.*, 320 F. Supp. 1262 (C.D. Calif. 1970). In an earlier decision, a California statute regulating hours and conditions of employment for women was struck down as being in conflict with Title VII. *Rosenfeld* v. *Southern Pac. Co.*, 293 F. Supp. 1219 (C.D. Calif. 1968). Illinois hours limitations for working women have fallen. *Caterpillar Tractor Co.* v. *Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970). Ohio legislation restricting female employment in workshops and factories and prohibiting female employees from lifting anything weighing more than 25 pounds has also been held invalid. *Ridinger* v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Jones Metal Products Co.* v. *Walker*, 25 Ohio App. 2d 141 (1970).

In addition, certain policies relating to the employment of women have been held to violate Title VII. Recently the Supreme Court declined to review a Seventh Circuit decision holding that a retirement plan which requires female employees to retire at 62, but does not require men to retire until 65 is sex discrimination in violation of Title VII. *Drewrys Limited U.S.A., Inc.* v. *Bartmess*, 444 F. 2d 1186 (1971), cert. denied 40 L.W. 3213 (November 9, 1971). The Court also declined to review a Fifth Circuit ruling that an airline company's refusal to hire males as flight cabin attendants is sex discrimination in violation of Title VII. *Pan American World Airways, Inc.* v. *Diaz*, 442 F. 2d 385 (1971), cert. denied 40 L.W. 3213 (November 9, 1971). In two other cases employers' policies of refusing to hire women for jobs requiring the lifting of weights over a certain amount have been held invalid under Title VII. *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969). An airline's no-marriage rule for stewardesses have been held to constitute sex discrimination under Title VII. *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971).

Other employment cases favorable to women have been brought under the Equal Pay Act. For example, payment of men at a higher rate than women for the same job has been held to violate the Equal Pay Act. *Schultz* v. *Wheaton Glass Co.*, 421 F. 2d 259 (3rd Cir. 1970).

Women have also made gains in other areas of sex discrimination. Many of the long-accepted prohibitions and segregations are being removed. An example is state laws prohibiting female bartenders, which have been struck down in New Jersey and California. *Paterson Tavern and Grill Owners Assn., Inc.* v. *Borough of Hawthorne*, 108 N.J. Super. 433 (1970); *Sail'er Inn, Inc.* v. *Kirby*, 485 P. 2d 529 (1971). In another case a federal district court in New York held that the refusal of an ale house to serve women violated the equal protection clause of the Fourteenth Amendment. *Seidenberg* v. *McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (1970).

Other suits challenging the treatment of women on equal protection grounds have also been successful. A Pennsylvania statute providing for longer prison terms for women than for men committing the same crimes was held to violate equal protection. *Commonwealth* v. *Daniel*, 243 A. 2d 400 (1968). (See also, *U.S. ex rel. Robinson* v. *York*, 281 F. Supp. 8 (D. Conn. 1968), in which a federal court struck down a similar Connecticut statute.) A school board regulation requiring women teachers to take a leave of absence at the end of the fifth month of pregnancy has been held to violate equal protection.

Cohen v. *Chesterfield County School Board*, 326 F. Supp. 1159 (E.D. Va. 1971). In *Kirstein* v. *Rectors and Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970), a three-judge federal court held that the denial to women of education equal to that offered men at the University of Virginia at Charlottesville violated equal protection. The court approved a plan setting quotas for the admission of women.

The Justice Department has taken action to aid women in fighting discrimination. In an important suit against Libbey-Owens-Ford, the Attorney General won a decree giving women opportunity to achieve promotions and advancement on the same basis as male employees.

These events are not typical of a society which does not care to eliminate discrimination. Nor are they characteristic of a judicial system determined to maintain the status quo.

VI. HOW WOULD THE ERA BE INTERPRETED

If the Equal Rights for Women Amendment is approved, I believe that the Supreme Court will reach the conclusion that the ERA annuls every existing Federal and State law making any distinction between men and women however reasonable such distinction might be in particular cases, and forever robs the Congress and the legislatures of the fifty states of the Constitutional power to enact any such laws at any time in the future. I am not alone in entertaining this fear.

When the so called Equal Rights Amendment was under consideration in 1953, Roscoe Pound of the Harvard Law School and other outstanding scholars joined one of America's greatest legal scholars, Paul A. Freund of the Harvard Law School, in a statement opposing the Equal Rights Amendment upon the ground that they feared that "all devastating interpretations might be placed upon it if it should be adopted." This statement made these indisputable observations:

"If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common law provision dealing with the manifold relation of women in society would be forced to run the gauntlet of attack on constitutional grounds. The range of such potential litigation is too great to be readily foreseen, but it would certainly embrace such diverse legal provisions as those relating to a widow's allowance, the obligation of family support and grounds for divorce, the age of majority and the right of annulment of marriages, and the maximum hours of labor for women in protected industries.

"Not only is the range of the amendment of indefinite extent, but, even more important, the fate of all this varied legislation would be left highly uncertain in the face of judicial review. Presumably, the amendment would set up a constitutional yardstick of absolute equality between men and women in all legal relationships. A more flexible view, permitting reasonable differentiation, can hardly be regarded as the object of the proposal, since the Fourteenth Amendment has long provided that no state shall deny to any person the equal protection of the laws, and that Amendment permits reasonable classifications while prohibiting arbitrary legal discrimination. If it were intended to give the courts the authority to pass upon the propriety of distinctions, benefits and duties as between men and women, no new guidance is given to the courts and this entire subject, one of unusual complexity would be left to the unpredictable judgments of courts in the form of constitution decisions.

"Such decisions could not be changed by act of the legislature. Such a responsibility upon the courts would be doubtless as unwelcome to them as it would be inappropriate. As has been stated, however, the proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality. This branch of the dilemma is as repelling as the other."

After analyzing in some detail the laws whose validity might be jeopardized by the Equal Rights Amendment, the statement concluded with these observations:

"The basic fallacy in the proposed amendment is that it attempts to deal with complicated and highly concrete problems arising out of a diversity of human relationships in terms of a single and simple abstraction. This abstraction is undoubtedly a worthy ideal for mobilizing legislative forces in order to remedy particular deficiencies in the law. But as a constitutional standard, it is hopelessly inept. That the proposed equal rights amendment would open up an era of regrettable consequences for the legal status of women in this country is highly probable. That it would open up a period of extreme confusion in constitutional law is a certainty."

Appearing before the Senate Judiciary Committee hearings in September, 1970, it was obvious that Professor Freund has the same view today of the proposed amendment. In a colloquy with me, Professor Freund had the following to say:

Senator ERVIN. I also interpret your statement and what you have said to indicate a conviction on your part that there is grave danger that the courts will interpret the House-passed equal rights amendment, if it is ratified by the requisite number of States, as depriving Congress of the powers it now has under the equal protection clause to adopt legislation which is for the benefit of women?

Mr. FREUND. Yes. I think that is quite right because there must be intended some more absolute standard of equality than the equal protection clause embodies. That would be the point of the amendment.

Senator ERVIN. And if the House-passed equal rights amendment were ratified by the States, thus made a part of the Constitution, it is susceptible of interpretation that it would require the courts to strike down all legal distinctions made between men and women, no matter how reasonable and necessary these distinctions might be?

Mr. FREUND. That is my understanding of what the language as well as the purpose of the sponsors is today.

Professor Philip Kurland of the Chicago Law School also arrived at the same conclusion as Professor Freund. He said:

Professor KURLAND. I would think that the amendment as it is now simply provides that classification by sex by any governmental action is invalid.

Senator ERVIN. In other words, your interpretation of the amendment as presently phrased is that it would be probably interpreted to eliminate sex as a basis for classification in legislation?

Professor KURLAND. If I were charged with the interpretation of the language, that would be the conclusion that I would reach.

Senator ERVIN. If that interpretation would be correct, the law which exists in North Carolina and virtually every other state of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor KURLAND. That is right, unless the separate but equal doctrine is revived.

Perhaps one of the best guides to a general interpretation of the Equal Rights Amendment can be found in the *Yale Law Journal* article of April, 1971. That article has been called a "masterly piece of scholarship" by Senator Bayh and has been cited by Congresswoman Griffiths, the primary sponsor of the ERA in the House of Representatives, to "help you understand the purposes and effects of the ERA . . ." The *Yale Law Journal* gives us the following guidelines for the general interpretation of the ERA:

1. "The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other." (p. 889) ". . . the principle of the Amendment must be applied comprehensively and without exceptions." (p. 890)

2. "Only an unequivocal ban against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment." (p. 892) ". . . prohibition against the use of sex as a basis for differential treatment applies to all areas of legal rights." (p. 891) ". . . From this analysis it follows that the constitutional mandate must be absolute." (p. 892)

3. "Our legal structure will continue to support and command an inferior status for women so long as it permits any differentiation in legal treatment on the basis of sex." (p. 873) ". . . Equality of rights means that sex is not a factor." (p. 892)

VII. SPECIFIC AREAS AFFECTED BY THE EQUAL RIGHTS AMENDMENT

Time and space preclude me from an attempt to picture in detail the constitutional and legal chaos which would prevail in our country if the Supreme Court should feel itself compelled to place upon the Equal Rights Amendment the devastating interpretation feared by these legal scholars.

For this reason, I must content myself with merely suggesting some of the terrifying consequences of such an interpretation.

While the amendment would affect all areas of our society, I will mention only a few of the specific areas including: the military, the criminal law, privacy, domestic relations, and protective labor legislation.

VIII. MILITARY

The impact of the ERA on the military will be massive.

The Congress and the legislatures of the various states have enacted certain laws based upon the conviction that the physiological and functional differences between men and women make it advisable to exempt or exclude women from certain arduous and hazardous activities in order to protect their health and safety.

Among Federal laws of this nature are the Selective Service Act, which confines compulsory military service to men; the acts of Congress governing the voluntary enlistments in the armed forces of the nation which restrict the right to enlist for combat service to men; and the acts establishing and governing the various service academies which provide for the admission and training of men only. There is no question that these laws will be abolished. As Professor Paul Freund of the Harvard Law School said, "And so women must be admitted to West Point on a parity with men; women must be conscripted for military service equally with men . . ." Professor Phil Kurland of the Chicago Law School agrees.

The position of the Justice Department and the Defense Department is that women will be subject to the draft. In a letter to Senator Bayh dated February 24, 1972, the General Counsel for the Defense Department, J. Fred Buzhardt, dealt with some of the problems which would be caused by the ERA in the military. Mr. Buzhardt said:

"Further, there is the possibility that assigning men and women together in the field in direct combat roles might adversely affect the efficiency and discipline of our forces.

"On the other hand, if women were not assigned to duty in the field, overseas, or on board ships, but were entering the armed forces in large numbers, this might result in a disproportionate number of men serving more time in the field and on board ship because of a reduced number of positions available for their reassignment.

"If this amendment allowed no discrimination on the basis of sex even for the sake of privacy, we believe that the resulting charing of facilities and living quarters would be contrary to prevailing American standards.

"Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforce."

In a letter to Senator Ervin, Deputy Assistant Secretary of Defense Don R. Brazier said that Defense had not made any estimates of costs on changing the military to conform with the Equal Rights Amendment. Furthermore, Mr. Brazier said:

"The Department has not made such estimates and without specific proposals for each 'equal' service, it is impossible to make any estimate. One of the major areas that would contribute to increased costs would be separate facilities, both in terms of living quarters, as well as working facilities in areas where women are not currently stationed.

"Until a definitive plan is developed indicating where and under what circumstances women would serve in isolated areas, with combat forces, aboard ships, etc., it is not possible to make a definitive estimate of costs. If extensive additional facilities or modifications to current facilities were required, the costs could be considerable."

A very complete analysis of the ERA's effect on the military was compiled in the *Yale Law Journal* in April 1971. The significance of this article that Congresswoman Griffiths has said that the article ". . . will help you understand the purpose and effects of the Equal Rights Amendment" and Senator Bayh has called it a "masterly piece of scholarship." Thus, the proponents of the amendment feel that it will have the following effect on the military and I agree with them. No clearer or more unique history of legislative intent can be presented of the amendment and the military because both the opponents and the proponents agree on the amendment's effect in this area.

Significant excerpts from the *Yale Law Journal* which is supported by the amendment's proponents are as follows:

1. "The Equal Rights Amendment will have a substantial and pervasive impact upon military practices and institutions. As now formulated, the Amendment permits no exceptions for the military." (p. 969)

2. "Women will serve in all kinds of units, and they will be eligible for combat duty. The double standard for treatment of sexual activity of men and women will be prohibited." (p. 978)

3. "Neither the right to privacy nor any unique physical characteristic justifies different treatment of the sexes with respect to voluntary or involuntary service, and pregnancy justifies only slightly different conditions of service for women." (p. 969)

4. "Such obvious differential treatment for women as exemption from the draft, exclusion from the service academies, and more restrictive standards for enlistment will have to be brought into conformity with the Amendment's basic prohibition of sex discrimination." (p. 969)

5. "These changes will require a radical restructuring of the military's views of women." (p. 969)

6. "The Equal Rights Amendment will greatly hasten this process and will require the military to see women as it sees men." (p. 978)

7. "A woman will register for the draft at the age of eighteen, as a man now does." (p. 971)

8. "Under the Equal Rights Amendment, all standards applied through (intelligence tests and physical examinations) will have to be neutral as between the sexes." (p. 971)

9. "The military will clearly have sufficient time during the period after ratification to make the minor adaptations, such as the expansion of gynecological services, necessary to comply with the mandate." (p. 971)

10. "First, height standards will have to be revised from the dual system which now exists." (p. 971)

11. "The height-weight correlations for the sexes will also have to be modified." (p. 972)

12. Deferment policy "would provide that one, but not both, of the parents would be deferred. For example, whichever parent was called first might be eligible for service; the remaining parent, male or female would be deferred." (p. 973)

13. "If the rules continue to require discharge of women with dependent children, then men in a similar situation will also have to be discharged . . . . The nondiscriminatory alternative is to allow both men and women with children to remain in the service and to take their dependents on assignment to noncombat zones, as men are now permitted to do." (p. 975)

14. "Distinctions between single and married women who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children." (p. 975)

15. "Thus, if unmarried women are discharged for pregnancy, men shown to be fathers of children born out of wedlock would also be discharged. Even in this form such a rule would be suspect under the Amendment, because it would probably be enforced more frequently against women. A court will therefore be likely to strike down the rule despite the neutrality in its terms, because of its differential impact." (p. 975)

16. "Under the Equal Rights Amendment the WAC would be eliminated." (p. 976)

17. "Women are physically as able as men to perform many jobs classified as combat duty, such as piloting an airplane or engaging in naval operations . . . there is no reason to prevent women from doing these jobs in combat zones." (p. 977)

18. "No one would suggest that . . . women who serve can avoid the possibility of physical harm and combat. But it is important to remember that all combat is dangerous, degrading and dehumanizing." (p. 977)

19. "Male officers are provided a dependents' allowance based on their grade and the number of dependents . . . ." The Equal Rights Amendment will recognize "the husband of a female officer . . . as a dependent." (p. 978)

20. "Athletic facilities will also have to be made available to women personnel." (p. 978)

III. CRIMINAL LAW

Because of different physical characteristics, and health considerations, and other reasons, legislatures have adopted some criminal laws which apply to only one sex or the other or treat men and women differently in some degree. Because the Equal Rights Amendment will forbid any legal distinctions between men and women, all existing and future criminal laws of this nature would be nullified.

As in several areas, a good review of the types of laws that will be changed by the ERA was discussed in the April 1971 issue of the *Yale Law Journal*. This article has been cited with approval by the proponents of the ERA and the statements which I have excerpted should constitute a good example of what we could expect after passage of the act in the area of criminal law. The excerpts from the *Yale Law Journal* are as follows:

1. "Courts faced with criminal laws which do not apply equally to men and women would be likely to invalidate the laws rather than extending or rewriting them to apply to women and men alike." (p. 966)

2. "Courts will not likely invalidate sodomy or adultery laws that contain sex discriminatory provisions, instead of solving the constitutional problems by extending them to cover men and women alike." (p. 966)

3. "Seduction laws, statutory rape laws, laws prohibiting obscene language in the presence of women, prostitution and 'manifest danger' laws . . . The Equal Rights Amendment would not permit such laws, which base their sex discriminatory classification on social stereotypes." (p. 954)

4. "The statutory rape laws, which punish men for having sexual intercourse with any woman under an age specified by law . . . suffer from a double defect under the Equal Rights Amendment." (p. 957)

5. "To be sure, the singling out of women probably reflects sociological reality . . . Likewise, in this society, the bad reputation and illegitimate child which can result from an unprotected sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young man's. But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard . . . ." (p. 959)

6. "Adultery laws also contain sex discriminatory provisions which would be impermissible under the Equal Rights Amendment." (p. 962)

7. "Courts may be expected to hold that laws which confine liability for prostitution to women only are invalid under the Equal Rights Amendment." (p. 962)

8. "Just as the Equal Rights Amendment would invalidate prostitution laws which apply to women only, so the ERA would require invalidation of laws especially designed to protect women from being lured into prostitution." (p. 964)

9. "A court would probably resolve doubts about congressional intent by striking down the (Federal White Slave Traffic—Mann Act)." (p. 965)

IV. DOMESTIC RELATIONS LAW

The common law and statutory law of the various states recognize the reality that many women are homemakers and mothers, and by reason of the duties imposed upon them in these capacities, are largely precluded from pursuing gainful occupations or making any provision for their financial security during their declining years. To enable women to do these things and thereby make the existence and development of the race possible, these state laws impose upon husbands the primary responsibility to provide homes and livelihoods for their wives and children, and make them criminally responsible to society and civilly responsible to their wives if they fail to perform this primary responsibility. Moreover, these state laws secure to wives dower and other rights in the property left by their husbands in the event their husbands predecease them in order that they may have some means of support in their declining years.

If the Equal Rights Amendment should be interpreted by the Supreme Court to forbid any legal distinctions between men and women, it would nullify all existing and all future laws of this kind.

As with the military, a good analysis of what the amendment will accomplish in the area of domestic relations was set out in the *Yale Law Journal* which has been fully endorsed by Congresswoman Martha Griffiths and other proponents of the ERA. As I have stated earlier, no clearer legislative intent can be presented because I agree with the amendment's proponents that the ERA will have the following effects.

Significant excerpts from the *Yale Law Journal* which is supported by the proponents of the ERA in the area of domestic relations are as follows:

1. "The Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex." (p. 936)

2. "Thus, common law and statutory rules requiring name change for the married woman would become legal nullities." (p. 940)

3. "These states could conform to the

Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both." (p. 940)

4. "The Amendment would also prohibit the states from requiring that a child's last name be the same as his or her father's, or from requiring that a child's last name be the same as his or her mother's." (p. 941)

5. "In ninety per cent of custody cases the mother is awarded the custody. The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the proper guardian based on the sex of the parent." (p. [illegible])

6. "physical capacity to bear children can no longer justify a different statutory marriage age for men and women." (p. [illegible])

7. "mere estimates of emotional preparedness founded on impressions about the 'normal' adolescent boy and girl are based on the kind of averaging which the Equal Rights Amendment forbids." (p. [illegible])

8. "The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage." (p. 940)

9. "a court would do away with the rule that refusal to accompany or follow a husband to a new domicile amounts to desertion or abandonment." (p. 942)

10. "A husband would no longer have grounds for divorce in a wife's unjustifiable refusal to follow him to a new home." (p. 942)

11. "the traditional rule is that the domicile of legitimate children is the same as their father's . . . The Equal Rights Amendment would not permit this result." (p. 942)

12. "In all states husbands are primarily liable for the support of their wives and children . . . the child support sections of the criminal nonsupport laws . . . could not be sustained where only the male is liable for support." (p. 944 and 945)

13. "The Equal Rights Amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex." (p. 945)

14. "Two different systems have been adopted in the United States for distributing property rights within a family—the community property system and the common law system . . . As both systems currently operate, they contain sex discriminatory aspects which would be changed under the Equal Rights Amendment." (p. 946)

15. "Under the Equal Rights Amendment, laws which . . . favor the husband as manager (of community property) in any way, would not be valid." (p. 947)

16. "All states except North Dakota and South Dakota give women a nonbarrable share in her husband's estate, but a number of states fail to give the husband a corresponding legal claim in his wife's estate . . . the discriminatory laws would either be invalidated or extended." (p. 949)

17. "a court could invalidate (many grounds for divorce) without doing any serious harm to the overall structure of the states' divorce laws . . . These are pregnancy by a man other than husband at time of marriage, nonsupport, alcoholism of husband, wife's unchaste behavior, husband's vagrancy, wife's refusal to move with husband without reasonable cause, wife a prostitute before marriage, indignities by husband to wife's person, and willful neglect by husband." (p. 950)

18. "Like the duty of support during marriage and the obligation to pay alimony in the case of separation or divorce, nonsupport would have to be eliminated as a ground for divorce against husbands only . . ." (p. 951)

19. "The laws that grant a husband a divorce because at the time of marriage he did not know his wife was pregnant by another man would be subject to strict scrutiny under the unique physical characteristics test." (p. 951)

20. "The Equal Rights Amendment would not require that alimony be abolished but only that it be available equally to husbands and wives." (p. 952)

21. "the laws could provide support payments for a parent with custody of a young child who stays at home to care for that child so long as there was no legal presumption that the parent granted custody should be the mother." (p. 952)

22. The ERA would require "for maintenance to be paid from one spouse to the other if the spouse seeking maintenance lacks sufficient property to provide for his reasonable needs and is unable to support himself through appropriate employment." (p. 952)

II. PROTECTIVE LABOR LEGISLATION

Many states and the Federal government have enacted labor legislation which protects women from certain forced activities. These protections were not always easy to develop. As Margaret Mead, noted anthropologist, said to a AFL–CIO meeting in March, 1971, "In the beginning of mining, there were women down those mines and children . . . we got the women and children out of the mines you know." Dr. Mead then goes on to say, "I've been against the equal rights amendment always."

The largest labor organization in the country, the AFL–CIO has recommended that Congress not pass the Equal Rights Amendment for the same reason that Margaret Mead opposed it: The adverse effect the amendment will have on hard-won protective legislation for women.

In its Resolution No. 122, the AFL–CIO states:

"We continue opposition to the so-called equal rights amendment as an unnecessary addition to the Constitution, ultimately more harmful than helpful to the legal rights of women."

Prior to the adoption of the resolution, the executive council of the AFL–CIO, in a report to its convention, said:

"We have opposed the equal rights amendment to the Constitution because of its potentially destructive impact on State labor legislation for women workers . . . Experience, to date, shows that 'equality' has been used to remove labor law protections for women, rather than to extend them or adapt them to men. The proposed equal rights amendment would render all protective labor laws for women workers unconstitutional, as well as any other laws treating the sexes differently. Such laws, for example, include marriage laws which place primary responsibility for family support on husbands and fathers."

A librarian at the University of California Library, Mrs. Laurel Burley, has written on the drastic consequences which would result to the protective labor laws for women if the ERA passes. Those upper-class, well-educated women who are pushing so hard for this amendment should ponder Mrs. Burley's words. She states that:

"The major danger in the proposed ERA lies in the fact that it would in one fell swoop invalidate all protective legislation enacted by the States to protect working women from exploitative employers . . . Protective legislation not only sets maximum hours and minimum wages standards, but also mandates such provisions as rest areas, toilet facilities, and elevators, adequate lighting and ventilation, rest and meal breaks (including the right to eat one's meal away from the immediate work area), adequate drinking water (important for women and children who are farmworkers), and protective garments and uniforms."

Mrs. Burley feels that some of the results of court action under Title VII of the 1964 Civil Rights Act are indicative of the changes which will be brought about the extreme burdens of the Equal Rights Amendment. On this point, she states:

"Some idea of what might be expected were the ERA to pass can already be seen in the use being made of Title VII of the Civil Rights Act. In late 1969 Fibreboard Corporation in Antioch, California began, to force women to work 16 hours a day and to lift backbreaking weights. Pacific Telephone in 1970 began ignoring state protective legislation relating to minimum hours. In fall 1970 Oregon took away the right of women to have two ten-minute rest breaks in an eight-hour day, and another large California corporation, Crown Zellerbach, began denying meal breaks to both men and women working in the Antioch plant. In summer 1971 a U.S. Court of Appeals struck out the sections of the California Labor Code regulating maximum weight lifting and the eight-hour day, 48-hour week for women. All these actions were justified on the basis that Title VII and EEOC guidelines superseded state protective legislation. Such instances are mounting at an incredible rate. On the basis of Title VII, 17 states have either totally or substantially annulled or repealed protective legislation covering women. *The ERA as it stands will add the finishing touch.*

As in other areas, I believe the *Yale Law Journal* article which has been adopted by Congresswoman Griffiths as "explaining the ERA" should be read to determine its effects on labor legislation. Excerpts from the article state that:

1. "Under the Equal Rights Amendment, courts are thus not likely to find any justification for the continuance of laws which exclude women from certain occupations." (p. 929)

2. "Laws which require employers to impose leave on pregnant employees for a specified period before and after childbirth, without providing job security or retention of accrued benefits, such as seniority credits . . . would fall." (p. 930) The article cites as an example which will be struck down in every state, a school board regulation imposing maternity leave at least four months prior to the expected birth of her child." (p. 931)

3. "There is little reason to doubt, therefore, that courts will invalidate weightlifting regulations for women under the Equal Rights Amendment." (p. 926)

4. "This result (to invalidate maximum hours which apply only to women) would also be predicted from principles of statutory construction under the Equal Rights Amendment." (p. 926)

5. "The courts are likely to . . . equalizing both sexes under the Equal Rights Amendment by invalidating (a law protecting women from coerced overtime)." (p. 926)

6. "Laws which restrict or regulate working conditions would probably be invalidated." (p. 926)

III. MISCELLANEOUS

Because of the broad nature of the ERA, there is really no way to tell just how far it will reach. As Professor Paul Freund of the Harvard Law School said, "The range of potential litigation is too great to be readily foreseen . . ." Therefore, I believe it would be profitable to mention just several random examples which were brought out in the April 1971 *Yale Law Journal*. As I have mentioned, before, the *Yale Law Journal* is unique because it provides a very minimum level of change which the ERA will bring about. This is true because of the strong support of the article by Congresswoman Griffiths and other supporters of the ERA. Under miscellaneous examples, the article mentions:

1. "the government cannot rely upon the administrative technique of grouping or averaging where the classification is by sex . . . whatever the price in efficiency, the classification must be made on some other basis." (p. 891)

2. "It is obvious that the marginal relationship of the unique physical characteristics of pregnancy to the problem of discrimination would require invalidation . . . of a government regulation to reduce discrimination by barring women from certain jobs."

3. Men will get extensive leave for child rearing because "if only women can get extensive leave for child rearing it becomes economically impossible for men to stay at home to care for children while their wives work." (p. 897)

4. "A rule allowing sick leave only to mothers when a member of their household is sick is a prohibited sex classification." (p. 898)

5. "A law might penalize adults with primary responsibility for child care from working in managerial jobs, on the grounds that the function of caring for children was inconsistent with substantial occupational responsibility. Such a law or government regulation would constitute a serious violation of the Equal Rights Amendment." (p. 898)

6. "Protection against indirect, covert or unintentional sex discrimination is essential to supplement the absolute ban on explicit sex classifications of the Equal Rights Amendment." (p. 900)

7. "Since the courts have power to grant affirmative relief in framing decrees in particular cases . . . such decrees could provide remedies for past denial of equal rights which take into account sex factors and give special treatment to the group discriminated against." (p. 906)

8. "Affirmative action may appear, paradoxically, to conflict with the absolute nature of the Equal Rights Amendment. But where damage has been done by a violator who acts on the basis of a forbidden characteristic, the enforcing authorities may also be compelled to take the same characteristic into account in order to undo what has been done." (p. 904)

9. "There is no doubt that the Equal Rights Amendment would eliminate discrimination on account of sex in the public schools and public university systems." (p. 902)

10. "It would seem clear that the basic principles of state action would, as a general proposition, require that the state eliminate male domination from the educational system." (p. 907)

11. "States which grant jury service exemptions to women with children will either extend the exemption to men with children or abolish the exemption altogether." (p. 920)

THE RIGHT TO PRIVACY

I believe that the absolute nature of the Equal Rights Amendment will, without a doubt, cause all laws and state-sanctioned practices which in any way differentiate between men and women to be held unconstitutional. Thus, all laws which separate men and women, such as separate schools, restrooms, dormitories, prisons, and others will be stricken. Also, men and women will be thrown together with no separation on the grounds of sex in the military.

The proponents of the ERA mention that the Constitutional right to privacy will protect and keep separate items such as public restrooms; however, this assertion overlooks the basic fact of constitutional law construction: The most recent constitutional amendment takes precedence over all other sections of the Constitution with which it is inconsistent. Thus, if the ERA is to be construed absolutely, as its proponents say, then there can be no exception for elements of publically imposed sexual segregation on the basis of privacy between men and women.

Even assuming the very unlikely result that privacy will allow segregation of the sexes in places like the military, Fred Buzhardt, General Counsel of the Defense Department, mentioned the physical impossibility of providing this always in the military. Mr. Buzhardt said:

"Even if segregation of living quarters and facilities were allowed under the amendment, during combat duty in the field there are often, in effect, no facilities at all, and privacy for both sexes might be impossible to provide or enforce."

Professor Paul Freund of the Harvard Law School testified about this matter before the Senate Judiciary Committee in 1970. After pointing out that the amendment would be absolute, Professor Freund said that it would follow that the ERA "would require that there be no segregation of the sexes in prisons, reform schools, public restrooms, and other public facilities."

Professor Phil Kurland, Editor of the Supreme Court Review and a Professor of Law at the University of Chicago Law School stated before the Judiciary Committee:

Senator ERVIN. The law which exists in North Carolina and in virtually every other State of the Union which requires separate restrooms for boys and girls in public schools would be nullified, would it not?

Professor KURLAND. That is right, unless the separate but equal doctrine is revived.

Senator ERVIN. And the laws of the States and the regulations of the Federal government which require separate restrooms for men and women in public buildings would also be nullified, would it not?

Professor KURLAND. My answer would be the same.

As Professors Freund and Kurland testified there is no qualification of the ERA for the privacy of women just as there will be none for the draft or protective labor laws.

A few examples in our society where the privacy aspect of the relationship between men and women would be changed are:

1. Police practices by which a search involving the removal of clothing will be able to be performed by members of either sex without regard to the sex of the one to be searched.

2. Segregation by sex in sleeping quarters of prisons or similar public institutions would be outlawed.

3. Segregation by sex of living conditions in the armed forces would be outlawed. This includes close quarter living in combat zones and barracks.

4. Segregation by sex in hospitals would be outlawed.

5. Physical exams in the armed forces will have to be carried out on a sex neutral basis.

There are, of course, numerous other examples which flow from the absolute nature of the Equal Rights for Women amendment.

IV. THE RADICAL EFFECT OF THE EQUAL RIGHTS AMENDMENT ON THE AMERICAN SOCIAL STRUCTURE

In the hearings before the Senate Judiciary Committee last year, Professor Paul Freund of the Harvard Law School testified that:

"Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear."

Like Professor Freund, it is not clear to me either if the proponents of the amendment shrink from these implications. This matter illustrates as well as any the radical departures from our present system that the ERA will bring about in our society. Speaking in opposition to the ERA, Professor James White of the Michigan Law School also mentioned certain bizarre results which would flow from passage of the ERA. Professor White said:

"With the exception of Illinois and perhaps a few other states, there are laws on the books which make it a crime to engage in certain kinds of homosexual activity. First of all, I suppose the amendment would bring in question all that law . . . I think the question is, is this the way we should do away with it or should we allow the states to control this themselves?"

Professor White continued that there would certainly be litigation on the sexual requirements of the marriage ceremony and that "conceivably a court would find that the State had to authorize marriage and recognize marital legal rights between members of the same sex." At that point in the testimony, Professor White's comments centered on the effect on the community property laws of homosexual marriages. I wondered about the effect on adoption procedures.

* * * * *

Professor of Psychiatry at the Yale Medical School, Dr. Jonathan H. Pincus, has asked the following question: "Is the Equal Rights Amendment to be the 'Tonkin Gulf Resolution' of the American social structure?" In a statement in opposition to the ERA, Dr. Pincus goes on to answer his question in the affirmative, and in his discussion he sheds some real light on the radical changes which will be made in our social structure.

At the present time in all states husbands are primarily liable for the support of their wives and children but, as Representative Griffiths' approved article in the *Yale Law Journal* states, "The ERA would bar a State from imposing greater liability for support on a husband than on a wife merely because of his sex." Dr. Pincus is very concerned about the effects of this removal of a husband's responsibility. Dr. Pincus said:

"It seems to me that the removal of legal responsibility from a man for supporting a family, giving the family a name and protecting his daughters from the sort of treatment the U.S. Army might have in store for them before marriage is likely to have some effect on the manner in which men relate to their wives and children and vice versa; these traditional ties will be weakened."

Dr. Pincus feels that "a solid happy family life is the foundation of mental health and happiness," and as to the effects of the ERA on this family life, he goes on to state:

"I would predict that the Equal Rights amendment and many of the other goals of its proponents will bring social disruption, unhappiness and increasing rates of divorce and desertion. Weakening of family ties may also lead to increased rates of alcoholism, suicide and, possibly, sexual deviation."

Whether or not one agrees with the predictions of Dr. Pincus, I believe he is asking very genuine questions which should be discussed before the Constitution is amended. Before we begin tinkering with the very subtle mechanisms of family relationships and social responsibilities, should we not consider that we might in fact be passing a Tonkin Gulf Resolution of the American social structure?

* * * * *

While I believe that any unfair discriminations which the law has created against women should be abolished by law, I have the abiding conviction that the law should make such distinctions between them as are reasonably necessary for the protection of women and the existence and development of the race.

I share completely this recent observation by Mr. Bernard Swartz: "Use of the law in an attempt to conjure away all the differences which do exist between the sexes is both an insult to the law itself and a complete disregard of fact."

The late Justice Felix Frankfurter, in an eloquent statement in the *New Republic* magazine many years ago put it a different way. Justice Frankfurter said:

"Only those who are ignorant of the nature of law and of its enforcement and regardless of the intricacies of American constitutional law, or indifferent to the exacting aspects of woman's industrial life, will have the naivete or the recklessness to sum up woman's whole position in a meaningless and [illegible] phrase about "equal rights."

Let us consider for a moment whether there be a rational basis for reasonable distinctions between men and women in any of the relationships or undertakings of life.

When He created them, God made physiological and functional differences between men and women. These differences confer upon men a greater capacity to perform arduous and hazardous physical tasks. Some wise people even profess the belief that there may be psychological differences between men and women.

To say these things is not to imply that either sex is superior to the other. It is simply to state the all important truth that men and women complement each other in the relationships and undertakings on which the existence and development of the race depend.

The physiological and functional differences between men and women empower men to beget and women to bear children, who enter life in a state of utter helplessness and ignorance, and who must receive nurture, care, and training at the hands of adults throughout their early years if they and the race are to survive, and if they are to grow mentally and spiritually. From time whereof the memory of mankind runneth not to the contrary, custom and law have imposed upon men the primary responsibility for providing a habitation and a livelihood for their wives and children to enable their wives to make the habitations homes, and to furnish nurture, care, and training to their children during their early years.

In this respect, custom and law reflect the wisdom embodied in the ancient Yiddish proverb that God could not be everywhere, so he made mothers. The physiological and functional differences between men and women constitute the most important reality. Without them human life could not exist.

For this reason, any country which ignores these differences when it fashions its institutions and makes its laws is woefully lacking in rationality.

Our country has not thus far committed this grievous error. As a consequence, it has established by law the institutions of marriage, the home, and the family, and has adopted some laws making some rational distinctions between the respective rights and responsibilities of men and women to make these institutions contribute to the existence and advancement of the race.

It may be that times are changing and more and more women will leave the home to compete in the business and professional community. However, I would like to call the Senate's attention to the remarks of Professor Phil Kurland of the University of Chicago Law School on this point. He said:

"Times have changed in such a way that it may well be possible for the generation of women now coming to maturity, who had all the opportunities for education afforded to their male peers and who had an expectation of opportunities to put education to the same use as their male peers, to succeed in a competitive society in which all differences in legal rights between men and women were wiped out. There remains a very large part of the female population on whom the imposition of such a constitutional standard would be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keepers of their homes. There are a multitude of women who still find fulfillment in this role. In the eyes of some, this may be unfortunate, but it is true. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Certainly the desire to open opportunities to some need not be bought at the price of removal of legal protections from others."

BY THE EQUAL RIGHTS AMENDMENT: A CASE STUDY IN ONE SPECIFIC AREA

One of the most interesting assertions of the article in the *Yale Law Journal* which Representative Griffiths says "explains the workings of the amendment," is the statement that:

"The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. . . . The states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both . . . thus common law and statutory rules requiring name change for the married woman would become legal nullities."

The effects of this requirement on the record-keeping demanded by our society would be staggering. Imagine an attorney searching a land title with this type of last-name system.

The wisdom of allowing a state to determine that a wife's legal name shall be that of her husband has just been upheld 9-0 in a per curiam decision of the Supreme Court in the case of *Forbush v. Alabama*. The interest of the State in maintaining control over licenses and requiring the most efficient way to do so should be obvious to everyone, as it was to all the members of the Supreme Court. But it's not obvious to the proponents of the ERA who want to abolish all legal pronouncements favoring the husband's surname.

Just a cursory check of only a very few of the laws of the states will indicate just how far-reaching the Equal Rights Amendment will be in this area alone. Most states appear to recognize the common law rule that a wife assumes her husband's surname. *E.g. People ex. rel. Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E. 2d 642 (1945); *Freeman v. Hawkins*, 77 Tex. 498, 14 S.W. 364; *Chapman v. Phoenix National Bank of the City of New York*, 85 N.Y. 437 (1881); *Bacon v. Boston Electric Railway Co.*, 256 Mass. 30, 152 N.E. 35 (1926).

In addition, many state statutes are based upon the assumption that a woman assumes her husband's surname upon marriage. For example, statutes relating to the issuance of driver's licenses often include a provision requiring licensed drivers to notify a state agency of changes in name resulting from marriage. *See, e.g.* Colo. *Rev. Stat. Ann.* Sec. 13-4-17; *Fla. Stat. Ann.* Sec. 322.19; *Ill. Ann. Stat.* Ch. 95½, Sec. 6-116; *Ind. Ann. Stat.* Sec. 47-2710; *Kan. Stat. Ann.* Sec. 8-248; *Ky. Rev. Stat.* Sec. 186.540; *Me. Rev. Stat. Ann.* tit. 29, Sec. 546; *Minn. Stat. Ann.* Sec. 171.11; *Mont. Rev. Codes Ann.* Sec. 31-140; *N.M. Stat. Ann.* Sec. 64-13-66; *N.D. Century Code* Sec. 39-06-20; *Okla. Stat. Ann.* tit. 47, Sec. 6-116; *R.I. Gen. Laws Ann.* Sec. 31-10-32; *S.C. Code Ann.* Sec. 46-179; *Tenn. Code Ann.* Sec. 59-709; *Tex. Rev. Civ. Stat. Ann.* Art. 6687b, Sec. 20; *W. Va. Code Ann.* Sec. 17B-2-13.

State statutes relating to divorce often authorize courts to change a woman's name upon divorce. *See, e.g. Alaska Stat.* Sec. 09.55.010 (no court order necessary); *Arizona Rev. Stat. Ann.* Sec. 25-319; *Ark. Stat. Ann.* Sec. 34-1216; *Cal. Civ. Code* Sec. 4457 (annulment), 4521 (dissolution); *Conn. Gen. Stat. Ann.* Sec. 46-21; *Del. Code Ann.* tit. 3, Sec. 1556; *D.C. Code Ann.* Sec. 16-915; *Ga. Code Ann.* Sec. 30-121; *Hawaii Rev. Laws* Sec. 574-5; *Ill. Ann. Stat.* ch. 40, Sec. 17; *Ind. Ann. Stat.* Sec. 3-1223; *Kan. Stat. Ann.* Sec. 60-1610; *Ky. Rev. Stat. Ann.* Sec. 403.060 (if divorce obtained by wife); *Me. Rev. Stat. Ann.* tit. 19, Sec. 752; *Mass. Gen. Laws Ann.* ch. 208, Sec. 23; *Mich. Comp. Laws Ann.* Sec. 552.391 (if no minor children); *Minn. Stat. Ann.* Sec. 518.27 (if wife obtained divorce); *Mo. Ann. Stat.* Sec. 452.100 (if wife obtains divorce); *Nev. Rev. Stat.* Sec. 125.130; *N.J. Stat. Ann.* Sec. 2A:34-21; *N.C. Gen. Stat.* Sec. 50-12; *Ohio Stat. Ann.* tit. 13, Sec. 1270 (if husband at fault); *Ore. Laws 1971*, ch. 280, Sec. 12; *Pa. Stat. Ann.* tit. 23, Sec. 98 (women may elect to use maiden name after divorce); *R.I. Gen. Laws Ann.* Sec. 15-5-17 (if wife obtains divorce); *S.C. Code Ann.* Sec. 20-117; *Tex. Rev. Civ. Stat.* art. 4631 (either party may change name upon divorce); *Vt. Stat. Ann.* tit. 15, Sec. 557 (if wife obtains divorce); *Va. Code Ann.* Sec. 20-121; *Wash. Rev. Code Ann.* Sec. 26.08.130; *W. Va. Code Ann.* Sec. 48-2-23 (if no children); *Wis. Stat. Ann.* Sec. 247.20 (if no children and no alimony).

State voter registration laws often include provisions requiring women to reregister when their names are changed by marriage. *See, e.g.*, *Colo. Rev. Stat. Ann.* Sec. 49-4-19; *Del. Code Ann.* tit. 15, Sec. 1705; *Ill. Ann. Stat.* ch. 46, Sec. 6-44; *Ind. Ann. Stat.* Sec. 29-3430 (but women may vote or run for office under professional name); *Kan. Stat. Ann.* Sec. 25-2316; *Ky. Rev. Stat. Ann.* Sec. 117.735; *La. Rev. Ann.* Secs. 18:41, 234, 241; *Me. Rev. Stat. Ann.* tit. 21, Secs. 250, 251 (notification of change required); *Md. Ann. Code* art. 33 Secs. 3-9, 3-16; *Mass. Gen. Laws Ann.* ch. 51 Sec. 2 (notification); *Neb. Rev. Stat.* Sec. 32-216; *Nev. Rev. Stat.* Sec. 293.517; *N.J. Stat. Ann.* Sec. 19:31-13; *N. M. Stat. Ann.* Sec. 3-4-5; *Ohio Rev. Code Ann.* Sec. 3503.16 (not necessary to reregister if name is not changed upon marriage); *Ore. Rev. Stat.* Secs. 247.390, 247.440; *R. I. Gen. Laws Ann.* Sec. 17-9-16 (notification); *S.D. Comp. Laws Ann.* Sec. 12-4-19; *Tenn. Code Ann.* Secs. 2-306; *Va. Code Ann.* Sec. 24.1-61; *Wash. Rev. Code Ann.* Sec. 29.10.040.

State laws regulating notaries public also often contain provisions involving name changes resulting from marriage. *See, e.g.*, *Iowa Code Ann.* Sec. 77.12 (married female notaries may continue to use maiden names); *N.J. Stat. Ann.* Sec. 52:7-7 (married female notaries to use hyphenated name); *Pa. Stat. Ann.* tit. 57, Sec. 156 (female married notaries must notify state agency of change of name); *Va. Code Ann.* Sec. 55-117 (female married notaries to indicate maiden name); *Wyo. Stat. Ann.* Sec. 32-8 (female married notaries to notify state agency of name change and to add husband's surname to signature).

State statutes which authorize civil actions for change of name also sometimes have provisions which are clearly based on the assumption that a wife's legal surname is the surname of her husband. *See, e.g.*, *Iowa Code Ann.* Sec. 674-1 (married woman may not bring action to change her name); *Iowa Code Ann.* Sec. 674-10 (if husband changes his surname, wife's name is also changed); *Ky. Rev. Stat. Ann.* Sec. 401-010 (married women not allowed to change name); *Mich. Comp. Laws Ann.* Sec. 711.1 (if husband changes name, wife's name also changes); *Minn. Stat. Ann.* Sec. 259.10 (if husband changes name, wife's name changes if she joins in the application—statute does not indicate what happens if wife fails to join in application); *Vt. Stat. Ann.* tit. 5, Sec. 814 (if husband changes name, wife's name also changes).

Finally, in some state statutes reference is made to "change of legal name" without it being specified whether this includes name changes resulting from marriage. *See e.g.*, *Mass. Gen. Laws Ann.* ch. 30, Sec. 13 (notaries must reregister upon change of name); *Neb. Rev. Stat.* Sec. 64-114 (notaries changing legal name may continue to use name under which they received commission); *N.H. Rev. Stat. Ann.* Sec. 261-2 (driver's license holders required to make notification of change of legal name); *S.C. Code Ann.* Sec. 49-8.1 (notaries to apply for change of name on commission upon legal change of name). In light of the common law rule, however, such provisions are likely to be held to apply to changes of name by marriage.

It should be noted, in conclusion, that the above listing of state statutes is not exhaustive. Rather, it is meant to suggest the kinds of state statutes which include provisions based upon the assumption that a woman's legal name changes upon marriage.

XVI. A REASONABLE ALTERNATIVE TO THE ERA

This brings us to the question whether Congress should consider the submission to the States of a Constitutional amendment to deal with the matter, and whether such amendment should permit Congress and the States acting within their respective jurisdictions to make reasonable distinctions between the rights and responsibilities of men and women in appropriate areas of life.

I honestly believe that the equal protection clause, properly interpreted, is sufficient to abolish all unfair legal discriminations made against women by state law.

Despite this belief, I intend to offer an amendment to the ERA which would prevent constitutional chaos. The amendment to the ERA which I plan to offer on the floor of the Senate reads as follows:

"The provisions of this article shall not impair the validity, however, of any laws of the United States or any State which exempt women from compulsory military service, or from service in combat units of the Armed Forces; or extend protections or exemptions to wives, mothers, or widows; or impose upon fathers responsibility for the support of children; or secure privacy to men or women, or boys or girls; or make punishable as crimes rape, seduction, or other sexual offenses."

TESTIMONY ON THE EQUAL RIGHTS AMENDMENT

BY PHYLLIS SCHLAFLY

I am Phyllis Schlafly of Alton, Illinois, a homemaker and mother of six children, a member of the Illinois Bar, and the president of Eagle Forum, a national pro-family movement.

The Equal Rights Amendment (ERA) was voted out of Congress on March 22, 1972, and was debated in State Capitols from that day until the expiration of the extended time period at midnight on June 30, 1982. Despite that extensive consideration, fifteen states never ratified ERA, and five states which originally ratified ERA thereafter changed their minds and rescinded. Therefore, at the end of the ten-year period, 20 of the 50 states were on record as saying NO to the Federal ERA. It takes only 13 states to prevent a change to the U.S. Constitution.

Constitutions are purposely made difficult to amend, whether they be constitutions of a nation, state, corporation, or organization. Amending the United States Constitution requires a contemporaneous consensus of a super-majority of three-fourths of the states. To induce a constitutional change that lacks the support of a super-majority is not in the best interests of a democratic republic. We had one such experience with the Prohibition Amendment. We don't need another with ERA.

The emotional issues involved with the right to drink alcohol are vastly exceeded by the emotional issues involved in the legal effects of ERA. ERA touches more divisive and deeply-held beliefs than any other Congressional issue.

The Illinois General Assembly voted on ERA at least once every year for ten years. The ERA experience was disruptive, divisive, and destructive of responsible law-making.

In the final weeks of the ERA battle in May and June of 1982, the State Capitol at Springfield, Illinois, became a three-ring circus. On the first floor of the Capitol, seven pro-ERA hunger strikers demonstrated in wheelchairs and on stretchers. On the third floor, another pro-ERA group called the "chain gang" chained themselves to the Senate Chamber door and lay on the floor night and day so that Senators had to step over them to get to their desks. Across the rotunda in the House, another platoon of the "chain gang" lay down in front of the Speaker's rostrum and forced legislative business to a halt.

Still another group of pro-ERA demonstrators poured pigs' blood (bought from a packing house) on our flags and on the marble floors, writing in blood the names of the Legislators whom they hated the most. I have appended to my testimony two newspaper photographs of the pouring of the blood and of the "chain gang" and ask that they be published with my testimony.

Unfortunately, these antics cannot be dismissed as merely those of a radical fringe. The pro-ERA leaders in and out of the Legislature gave every appearance of hoping that these ugly tactics would force Illinois to ratify ERA. Fortunately, Illinois had enough Legislators who refused to allow the Constitution to be amended by such shenanigans.

Some have argued that Congress should vote out ERA and "let the states decide." But the states have already decided, and the answer is NO. It simply isn't fair to put this monkey on the backs of State Legislators again after ten years (the original seven years plus the unprecedented three-year extension which a Federal Court ruled was unconstitutional). At the very least, we need a cooling-off period.

In all fairness, why not give the states the opportunity to vote on the School Prayer Amendment? The states should get the right to vote on that amendment before being sent ERA again.

Mr. Chairman, if you were supporting a piece of legislation, and you hadn't been able to get it passed for ten years, wouldn't you ask yourself, how can I amend it so as to gain more support and counter some of the criticisms against it? This is the way the legislative process works in a democratic republic. The testimonies presented to this Subcommittee by the ERA proponents reveal a stubborn refusal to address the legal effects of ERA, plus a preoccupation with economic and sociological conditions which would not be affected by ERA. Yet the legal effects touch such sensitive areas that they cannot be ignored. We thank AFL-CIO President Lane Kirkland, a pro-ERA witness before this Subcommittee on September 14, for recognizing that Congress must deal with the substantial issues in ERA such as abortion and the military.

Therefore, I propose a series of amendments which would address the major criticisms of the Equal Rights Amendment.

(l) This article shall not be construed to secure, expand or endorse any right to abortion or the funding thereof.

The most immediate and costly effect of ERA would probably be to mandate taxpayer-funding of abortion by making the Hyde Amendment unconstitutional. This would reverse the 5-to-4 U.S. Supreme Court decision in Harris v. McRae (1980). This effect is foreshadowed in the recent U.S. Supreme Court decision in Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission (77 L. Ed. 2d 89, June 20, 1983), in which Justice Stevens, joined by six other Justices, wrote: "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." (Id. at 103)

In a footnote, Justice Stevens quoted Representative Augustus F. Hawkins, speaking for the Pregnancy Discrimination Act during the House debate, as saying, "It seems only common sense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy." (123 Cong. Rec. 10582, 1972)

The scope of the Newport News case is limited to employment matters under Title VII, but the definition of "sex" discrimination enunciated in that law and in the Supreme Court decision constitutes the most authoritative legislative definition of what the word "sex" would mean in ERA or in any other federal legislation (unless a contrary or limiting definition is specifically included). There is an exception in the Pregnancy Discrimination Act (42 U.S.C. sec. 2000e-(k)) to prevent compulsory funding of abortions. But there is no exception in ERA as presently written; the absolute language of ERA would be a constitutional mandate against all sex discrminination and would nullify any exceptions in existing laws.

It is clear from briefs filed by pro-abortion groups in three states with a State ERA in their state constitutions that pro-abortion lawyers will use ERA as a major argument to persuade the courts to force taxpayer-funding of abortion.

In the 1983 Pennsylvania case of Fischer, Planned Parenthood, et al v. Dept. of Public Welfare, the American Civil Liberties Foundation of

Pennsylvania argued in its Complaint that it is unconstitutional under the Pennsylvania State ERA to deny state tax funds for abortions because this would "constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment."

In the 1980 Massachusetts case of Moe v. King, the Civil Liberties Union of Massachusetts argued in its Complaint that it is unconstitutional under the Massachusetts State ERA to deny state tax funds for abortions because "singling out for special treatment and effectively excluding from coverage an operation which is unique to women ... constitute[s] discrimination on the basis of sex, in violation of the Massachusetts Equal Rights Amendment."

In the 1978 Hawaii case of Hawaii Right to Life v. Chang, the American Civil Liberties Union brief argued that "withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex."

Would the pro-abortion lawyers be successful with their argument in the U.S. Supreme Court under the Federal ERA? Harris v. McRae, the decision which upheld the constitutionality of the Hyde Amendment under the present Constitution, was a 5-to-4 decision. The pro-abortion majority on the Supreme Court is at least 6-to-3. Therefore, the pro-abortion-funding advocates -- using the definition of "sex" accepted by seven Justices in Newport News -- would need to convince only one pro-abortion Justice that ERA makes the "sex discrimination" difference.

Congressmen who oppose taxpayer-funding of abortion should not give the Supreme Court this opportunity to overturn every vote Congress has ever taken in approval of the Hyde Amendment. The sensible course of action is to amend ERA to remove abortion and abortion-funding from ERA's grasp.

Something happened in Wisconsin this year which provides further proof that the pro-ERA advocates admit the ERA-abortion connection. In an attempt to put an ERA into the Wisconsin state constitution (in a state where ERA had already once been defeated on a referendum), the pro-ERA advocates added a clause to prohibit the use of ERA for abortion purposes. This shows that ERA advocates themselves know that ERA will give constitutional protection to abortion and abortion funding unless the language of ERA specifically prohibits this result. After this amendment was added, the Wisconsin Civil Liberties Union opposed the Wisconsin State ERA "unless the objectionable anti-civil libertarian [i.e., anti-abortion] language is removed."

Clearly, the burden of proof is on the ERA advocates to prove that ERA will not require the spending of tax funds for abortions -- and this burden of proof is impossible to meet unless specific language is added to the text of ERA to prohibit that result. We recommend an amendment which would make ERA abortion-neutral; it would not overturn Roe v. Wade -- it would simply prevent ERA from being used to mandate taxpayer-funding of abortions or to grant any other abortion rights. All pro-life groups are united that it is absolutely essential to have an abortion-exclusion amendment to ERA.

(2) This article shall not be construed to grant or secure any rights to homosexuals or lesbians.

The leading textbook on sex discrimination used in U.S. law schools, written by nationally-known pro-ERA advocate Barbara Babcock, states: "The effect that the Equal Rights Amendment will have on discrimination against homosexuals is not yet clear. The legislative history suggests that it was not the intent of Congress [in 1971-72] to prohibit such discrimination. On the other hand, it is hard to justify a distinction between discrimination on the basis of the sex of one's sexual partners and other sex-based discrimination." (Barbara Babcock, Sex Discrimination and the Law (1975), p. 180)

An article called "The Legality of Homosexual Marriage" in the Yale Law Journal of January 1973 (p. 589) refutes the "legislative history" argument and states: "The stringent requirements of the proposed Equal Rights Amendment argue strongly for removal of this stigma [of deviance] by granting marriage licenses to homosexual couples who satisfy reasonable and non-discriminatory qualifications." The authors support ERA, homosexual marriages, and the ERA-homosexual connection.

In Baker v. Nelson (291 Minn. 310, 191 N.W.2d 185, 1971), the Minnesota court refused to permit same-sex marriages. The homosexuals' appeal from this decision under the 9th and 14th Amendments was dismissed by the U.S. Supreme Court (409 U.S. 810, 1972). The Yale Law

Journal article quoted above is widely cited as a forecast that ERA would would compel a contrary result.

Harvard Law School Professor Paul Freund testified in the original ERA hearings: "Indeed, if the law must be as undiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation." (Cong. Rec., Mar. 22, 1972, p. S5478)

Senator Sam J. Ervin, Jr., the leading constitutional lawyer in the U.S. Senate until his retirement, stated in Raleigh, North Carolina on February 22, 1977,: "I don't know but one group of people in the United States the ERA would do any good for. That's homosexuals."

A leading pro-ERA lawyer, Rita Hauser, gave a major address on the Equal Rights Amendment to the 1970 Annual Meeting of the American Bar Association in St. Louis in which she stated: "I also believe that the proposed [ERA] Amendment, if adopted, would void the legal requirement or practice of the states' limiting marriage, which is a legal right, to partners of different sexes."

The word used in ERA is "sex," not "women," and the "sex" in ERA is not defined or limited in any way. One would have to be blind, deaf and dumb not to be aware of the political activism of the homosexual community and their attempts (usually unsuccessful) to legislate their "gay rights" agenda at the Congressional, state legislative, and city council levels. To hypothesize that they would not litigate under ERA to get everything they have failed to get by legislation would be unrealistic, especially when prominent lawyers are already on record as confirming the ERA-homosexual connection.

The questions posed by the ERA-"gay rights" connection are endless -- and unanswerable -- unless Congress adds an amendment to clarify its intent. Would ERA prohibit us from denying marriage licenses to homosexuals and lesbians, and from denying them the tax benefits and spousal employment and medical benefits now accorded to husbands and wives? Would ERA prohibit the U.S. Armed Forces from discharging homosexuals and lesbians? Would ERA prohibit a judge from considering homosexuality/lesbianism in awarding child custody, adoptions, or artificial insemination rights? Would ERA make all anti-sodomy laws unconstitutional? Would ERA prevent a private school or church from dismissing a homosexual or lesbian employee? Would ERA force the hiring of homosexuals as local policemen? Would ERA prohibit landlords from refusing to rent apartments or rooms to homosexuals? Would ERA prohibit the Scouts from refusing to have homosexuals or lesbians as troop leaders? Would ERA force public-school sex-education curricula to present homosexuality as an acceptable "alternate lifestyle"? Would ERA prohibit colleges from denying campus recognition and funding to homosexual/lesbian student groups? Would ERA give "minority status" to homosexuals and lesbians under the Civil Rights Act and make them eligible for "affirmative action" benefits?

Then come the questions about disease, especially about AIDS for which the incubation period is two years, during which time no test can identify the disease-carriers. Would ERA prohibit us from refusing homosexuals the right to give blood to blood banks? Would ERA prohibit cities from closing down the homosexual bathhouses as public health nuisances? Would ERA prohibit police, paramedics, dentists, health personnel, and morticians from taking what they believe are adequate precautions to defend themselves against AIDS and other homosexual diseases? Would ERA prohibit cities from denying the use of public facilities to large gatherings of homosexuals (such as the "gay pride" demonstrations and the "gay rodeo")? Would ERA prohibit restaurants from barring homosexuals from food-handling jobs?

Since ERA prohibits all discrimination "on account of sex," would ERA prevent society from protecting itself against a class of people whose only identifiable difference is sex?

Some people will claim that the "sex" in ERA does not refer to "sexual preference." But the burden of proof is on those who make that claim, and there is no way they can prove it unless they put explicit language in ERA to prevent ERA from being used by the courts to grant privileges to homosexuals and lesbians which the various legislatures have thus far been unwilling to grant.

The 1983 experience with the proposed Wisconsin State ERA referred to above (in the abortion section of my testimony) applies equally to the ERA-"gay rights" connection. The pro-ERA advocates in Wisconsin added language to the proposed State ERA forbidding its use for "sexual preference." This proves that the pro-ERA advocates admit the connection. When the Wisconsin Civil Liberties Union testified against what it called the "anti-civil libertarian language" added to the Wisconsin ERA, this criticism included the "gay rights" exclusion language.

Congress, the states, and the American people are entitled to know for sure whether or not ERA includes the "gay rights" agenda. It would be unreasonable and irresponsible to leave it to the courts to resolve this sensitive issue. If Congress does not intend an ERA-"gay rights" connection, then why not say so by adding our proposed amendment?

(3) This article shall not be construed to require the drafting of women or the assignment of women to military combat.

The effect of ERA on the draft and on military duty is certain and is not disputed by pro-ERA lawyers. The House Judiciary Committee which reported out ERA in 1971 stated: "Not only would women, including mothers, be subject to the draft, but the military would be compelled to place them in combat units alongside of men."

The 1977 U.S. Civil Rights Commission book entitled Sex Bias in the U.S. Code, written largely by pro-ERA lawyer Ruth Bader Ginsburg (now a federal judge), stated: "The equal rights principle implies that women must be subject to the draft if men are, that military assignments must be made on the basis of individual capacity rather than sex." (p. 218)

The premier piece of pro-ERA literature, the 100-page article by Professor Thomas I. Emerson in the Yale Law Journal of April 1971, stated about ERA: "As between brutalizing our young men and brutalizing our young women there is little to choose.... Women will be subject to the draft.... Women will serve in all kinds of units, and they will be eligible for combat duty." (see pp. 969-978)

President Jimmy Carter called for the equal draft registration of women in 1980. This proposal was soundly rejected by Congress; the House and Senate both voted overwhelmingly to exempt all women from the draft registration law. The pro-ERA advocates then took their case to the U.S. Supreme Court and lost. In Rostker v. Goldberg on June 21, 1981, the Supreme Court upheld the exemption of all women (a sex classification) from the military draft and from draft registration, and described the necessity to exclude women from military combat as a self-evident truth which is obvious in a civilized society.

ERA would reverse Rostker v. Goldberg and make unconstitutional the male-only draft registration law plus the laws exempting women from military combat (10 U.S.C. §6015 and §8549).

Drafting women and sending them out in combat units to fight our country's wars would be so contrary to our nation's culture that this issue deserves to be debated and decided by itself in the light of whatever emergency faces us. We should not be compelled to fight the next war in a constitutional strait jacket based on a social experiment which defies all the wisdom of wartime experience.

The ERA-draft connection is a "sleeper" issue because few people really believe that Congress would do anything so foolish as voting to draft 18-year-old girls into the army. This is also a tremendously powerful issue because it is the one point at which ERA would take away traditional women's rights at the point of a gun and threaten a prison sentence for refusing to conform to ERA demands. It would produce a divisive national crisis if federal marshals started arresting 18-year-old girls for refusing to report for induction after getting their "greetings" from the President. And the irony of it all is that this strong-arm compulsion is deceitfully packaged in the name of "women's rights."

(4) This article shall not be construed to affect any benefit or preference given by the United States or any State to veterans.

We enjoy our freedom and independence because brave Americans, mostly men, were willing to fight for our country. One of the ways our nation has shown its gratitude is by giving veterans a slight preference in certain employment situations. That's little enough to repay them for what they did for us. Female veterans receive exactly the same preference as male veterans.

One of the effects of ERA would be to deprive veterans of this small preference. That this would not only be an effect of ERA, but is one of its purposes, was made clear in the testimony to this Subcommittee presented by Dorothy S. Ridings, president of the League of Women Voters, on September 14, 1983. She stated bluntly that ERA would overturn the Supreme Court decision in *Massachusetts v. Feeney*, which upheld veterans preference under our present Constitution.

The pro-ERA position is that veterans preference is sex discriminatory within the meaning of ERA because veterans are 98% male. This is the same type of rationale used in the ERA-abortion connection; since abortions are performed exclusively on women, it is a violation of "equal rights" to deny funding for abortions. Likewise, since 98% of veterans preference goes to men, it is a violation of "equal rights" to give veterans this advantage over non-veteran women.

In order to prevent ERA from substantially hurting veterans, an amendment should be added to ERA to prohibit it from affecting veterans preference.

(5) *This article shall not be construed by the Internal Revenue Service or by the courts to deny tax exemption to private schools, seminaries or churches which treat men and women differently.*

This amendment to ERA is made absolutely essential by the 1983 Supreme Court decision in *Bob Jones University v. United States*. In this decision the Court held that the Internal Revenue Service has the right to withdraw tax-exempt status from any school (including religious schools) which has any rule or regulation contrary to public policy, even though the regulation pertains to something so private as dating and marriage, and even though the regulation concerns a matter of religious principle. The Court recognized "the primary authority of the I.R.S. ... in construing the Internal Revenue Code," so that the I.R.S. can make these decisions without express authority in the statute.

The Court said: "Whatever may be the rationale for such private schools' policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy."

The Court ruled: "The Government has a fundamental, overriding interest in eradicating racial discrimination in education.... That governmental interest substantially outweighs whatever burden denial of tax benefits places" on the private religious schools' exercise of their religious beliefs.

If ERA means anything at all, it certainly means a policy of eradicating sex discrimination. For ten years, ERA lawyers (including presidents of the American Bar Association) have testified that the legal impact of ERA would be to treat "sex" exactly as we now treat "race."

Therefore, if ERA were ever added to our Constitution, it would give the Government a fundamental overriding interest in eradicating sex discrimination; and this interest would override the First Amendment rights of all religious schools. That means that churches which do not ordain women (or which treat women differently in any way) would lose tax exemption for their schools and seminaries.

(6) This article shall not be construed to deprive wives or widows of any right or benefit granted by any state, or to interfere with state laws that obligate husbands to support their wives.

American Jurisprudence, 2d, Volume 41, under the heading "Husband and Wife," summarizes American law on the matter of family support: "One of the most fundamental duties imposed by the law of domestic relations is that which requires a man to support his wife and family. In some jurisdictions, the duty of support is imposed on the husband by statute.... But it exists apart from statute, as a duty arising out of the marital relationship...." (This is the law of the marital relationship and does not describe the divorce or the post-divorce relationship.)

Nothing in this statement compels a wife to accept the support of a husband if she doesn't want it. Some women today, especially the pro-ERA advocates, appear to reject the traditional marriage relationship. They certainly have their freedom of speech and association to reject the "man and wife" relationship if they wish.

What is so strange is their demand that this support right be taken away from those women who do want it. For example, in explaining the effect of the Equal Rights Amendment, the 1977 book published by the U.S. Civil Rights Commission called Sex Bias in the U.S. Code (written by pro-ERA advocate Ruth Bader Ginsburg) states that the traditional family concept of husband-breadwinner and wife-homemaker "must be eliminated from the code if it is to reflect the equality principle." (p. 206)

Wives have lost their legal right to support in states which have a State ERA, as well as in a few other states where pro-ERA advocates have brought about statutory changes. But it makes no sense for the U.S. Constitution to prohibit for all time in the future the laws of family support which most husbands have obeyed, which still exist in most states, and which are a "fundamental" part of our culture. Eliminating the support laws does no good for the woman who does not have a husband, or who has a husband who evades his responsibility. But it does terrible damage to married women who have chosen the traditional role, and who may not have the skills to enter the labor force, because it tells all husbands that it is no longer their "duty" to support their wives.

It cannot be denied that one of the far-reaching effects of ERA -- and indeed a continuing goal of the pro-ERA advocates -- is to make all federal and state laws sex-neutral or gender-free. However, "spouse must support spouse" simply does not have the same meaning, grammatically or legally, as "husband must support wife." An amendment to ERA is urgently needed to prevent ERA from sacrificing the traditional legal rights of wives on the altar of the feminist sex-neutral society.

(7) This article shall not require the sex-integration of private schools, churches, hospitals, prisons, or public accommodations, or require treating males and females the same where differences tend to accommodate personal modesty.

Our experience with Title IX (the Education Amendments of 1972) provides a good precedent for how the American people demand exceptions to a general rule against sex discrimination. Congress could not pass Title IX until it first carved specific exceptions in Title IX for single-sex schools and colleges, military schools, seminaries, and college dormitory living facilities.

After the Department of Health, Education and Welfare began enforcing Title IX, other problems surfaced. For a time, Congress was compelled to amend Title IX almost every year in order to eliminate the mischief of a blanket rule against sex discrimination. One year, Congress amended Title IX to exempt fraternities, sororities, Boy Scouts, and Girl Scouts. A second year, Congress amended Title IX to exempt the American Legion-sponsored programs called Boys' State and Girls' State. A third year, Congress amended Title IX to exempt mother-daughter and father-son school events.

It is fortunate that Title IX was not part of the Constitution, else all these problems would have been raised to constitutional dimensions and have required separate constitutional amendments.

Title IX applies not only to all public schools and colleges, but also to all private schools and colleges that receive any public money. Would ERA extend to schools and colleges which are wholly private (receiving no public funding whatsoever)? Available evidence indicates that the answer to this question is Yes.

The U.S. Commission on Civil Rights, in a 1978 booklet called Statement on the Equal Rights Amendment, says: "Unlike Title IX, federal funding will not be required to trigger its [ERA's] application. ... [ERA] will be a clear mandate of the highest order that sex bias is not acceptable in our nation's schools." (p.16)

Virtually every pro-ERA lawyer states that ERA will impose a national standard which will apply the same strict standards to sex as we now apply to race. To predict what will be the effect of ERA in any area, just ask yourself, "how do we handle it in race?," and you will have the answer about the effect of ERA. If this answer is applied to all schools and colleges, this will eliminate diversity in education and force all students into the unisex conformity demanded by the pro-ERA advocates.

The burden of proof is on the pro-ERA advocates to provide language in ERA which would prevent ERA from treating sex exactly the same as we now treat race.

(8) This article shall not require insurance to ignore factual or actuarial differences between men and women.

ERA would have a massively costly effect on young women buying automobile accident insurance and on women of all ages buying life insurance, because the statistical facts that women have fewer accidents and tend to live longer than men could no longer be taken into consideration in the setting of lower rates for women.

Statistical evidence is overwhelming that women are entitled to lower rates because, as a group, they have fewer automobile accidents and they live longer. ERA would place an unfair, disproportionate burden of the costs of insurance on female policyholders who deserve lower rates because they cost less to insure.

The pro-ERA advocates admit that ERA will have the same effects as the proposed unisex insurance bills and, indeed, they say this is one of the purposes of ERA. As testified by other witnesses, this would cost young women hundreds of millions of dollars per year in additional automobile accident and life insurance premiums for which they would get no additional benefit.

Furthermore, ERA would raise all these matters to a constitutional level, so that there could not be any modification in the unisex insurance rule, however minor or reasonable, without another constitutional amendment.

An insurance exception amendment is needed to prevent this kind of mischief-making from tarnishing the U.S. Constitution and so that unforeseen problems can be remedied at the statutory level.

(9) Delete Section 2 of ERA.

It is a fundamental principle of constitutional construction that no language in the U.S. Constitution can be meaningless or redundant. Section 2 must have a purpose and an effect. Section 2 cannot mean merely that Section 1 must be obeyed and enforced. It is established law under Marbury v. Madison that the Supreme Court would have the authority to invalidate any federal or state law found to be in disharmony with Section 1.

Section 1 of ERA would require that all federal and state laws conform to its rigid, absolutist mandate, without any rational differences of treatment based on factual differences between men and women. Section 2 of ERA would grant affirmative powers to Congress and to the federal courts, either or both, to define (after ratification) what Section 1 means and to enforce that yet-to-be-determined definition.

In addition, Section 2 would enable Congress to preempt the field and to substitute its decision-making power for that of the states even though state laws are in harmony with Section 1.

Section 2 of ERA has the same language as the enforcement clauses of the 13th, 14th, and 15th Amendments, and we have had more than a century of experience with Court interpretations. Beginning in the mid-1960s, the Supreme Court drastically changed the official interpretation of the enforcement clause and redefined it as a positive grant of affirmative power to the Congress which is even greater than the Commerce Clause or the Necessary and Proper Clause.

Katzenbach v. Morgan would be the principal authority for interpreting Section 2 of ERA to give Congress both the power to preempt state laws which are otherwise completely constitutional, plus the power to write its own definition of the rights covered by Section 1. Morgan makes clear that the enforcement clause goes far beyond outlawing unconstitutional acts. It is a grant of affirmative power to the Congress to do whatever it thinks is "necessary and proper" to achieve the purposes of Section 1. The holding of Morgan is that, under the enforcement clause, Congress can outlaw a state practice that does not violate Section 1 if Congress believes that such practice tends to impair the goal which Section 1 is designed to promote.

Section 1 of ERA would require every federal and state law to be sex-neutral; but Section 2 of ERA would transfer from the states to the Federal Government the final decision-making power over all those areas of state law which traditionally have made differences of treatment on account of sex. These would include: marriage and marriage property laws, child custody and adoptions, divorce and alimony, abortion, homosexual laws, sexual crimes, private and public schools, school sports, protective labor laws, prison regulations, public accommodations, and insurance rates.

Here are some examples of how the vast Section 2 power could be used, based on a study of materials written by prominent pro-ERA advocates:

(a) ERA lawyers will argue that ERA makes family law a federal matter. The 1977 U.S. Civil Rights Commission publication Sex Bias in the U.S. Code, written by pro-ERA lawyer and now Federal Judge Ruth Bader Ginsburg, states that the concept of breadwinning-husband and homemaking-wife "must be eliminated from the Code if it is to reflect the equality principle." This report also states that "no-fault divorce" should be adopted nationally. (pp. 206 and 159)

(b) ERA lawyers will argue that ERA will impose the duty on Congress and state legislatures to set up and to finance child-care institutions for all children, regardless of need. They will argue that this mandate comes from the "equality principle" of Section 1, as affirmatively enforced by Section 2. Sex Bias in the U.S. Code states that, in order to achieve the "equality principle" of ERA, "the increasingly common two-earner family pattern should impel development of a comprehensive program of government-supported child care." (p. (214)

The Governor of Ohio set up a Task Force for the Implementation of the Equal Rights Amendment in 1975 which concluded: "The equality principle embodied in the ERA requires consideration of a new public policy on the issue of child care. Women who are mothers need to enjoy the same freedoms and opportunities as men who are fathers.... UNIVERSALLY AVAILABLE--Quality child care must be available to all families who need such services irrespective of their income level." (pp. 17-20)

(c) ERA lawyers will try to bring about a restructuring of Social Security in order to force the full-time homemaker (the dependent-wife) to pay a double Social Security tax in order to receive the same retirement benefit which the System has paid to homemakers for the past 40 years. This radical notion was set forth in a Social Security Administration document called Social Security and the Changing Roles of Men and Women published in 1979, which recommended three options to change the System, of which one was the Homemaker's Tax. Under this recommendation, the Federal Government would set "a specific dollar value for work performed in the home ... [and then] require homemakers to pay Social Security taxes on the imputed value of their services." (p. 105) The financial columnist, Sylvia Porter, is one of those who have argued that, "if some change along these lines is not enacted sooner, the Equal Rights Amendment, when finally passed, will require it." (Syndicated column, April 9, 1975)

Since it is an admitted fact that the Social Security law has been made completely sex-neutral by a combination of Congressional legislation and Supreme Court decisions, ERA should have no effect on it. This radical notion of taxing homemakers is part of the hidden agenda of the pro-ERA advocates who continue to claim that Social Security is an "ERA issue." They are counting on ERA being interpreted by judicial activists.

In any event, the power of Section 2 is tremendous, and the scope of subject matter that would come under the enforcement clause is virtually unlimited.

Conclusion

These nine are only the principal amendments needed to prevent ERA from having mischievous, unreasonable, and unwanted results. Harvard Law School Professor Paul A. Freund explained this need best when he wrote in the *Harvard Civil Rights-Civil Liberties Law Review* of March 1971: "Constitutional amendments, like other laws, cannot always anticipate all the questions that may arise under them. Remote and esoteric problems may have to be faced in due course. But when basic, commonplace, recurring questions are raised and left unanswered by text or legislative history, one can only infer a want of candor or of comprehension.... The real issue is not the legal status of women. The issue is the integrity and responsibility for the law-making process itself."

And for what! The only effect that ERA would have in the field of employment would be to overturn the 1977 Supreme Court case of *Dothard v. Rawlinson* which upheld the Bona Fide Occupational Qualification in Title VII of the Civil Rights Act and thereby denied a woman a job as a prison guard in an Alabama maximum security prison. Thus, the only gain for women in employment, under a Federal ERA, would be the opportunity for a small woman to get a job as a prison guard in a maximum security prison.

For this we are asked to constitutionalize taxpayer funding of abortions and homosexual marriages, allow our daughters to be drafted and sent into combat just like our sons, forfeit veterans preference and tax exemption of religious schools, sacrifice traditional rights of wives, abandon our right to have single-sex schools and extra-curricular activities, pay greatly increased insurance premiums, and transfer enormous new powers from the states to the federal courts.

The evidence is massive that ERA will, at the very least, reverse the following Supreme Court decisions:

(a) Harris v. McRae (upholding the Hyde Amendment),

(b) Baker v. Nelson (denying an appeal from a state court which refused to grant marriage licenses to homosexuals),

(c) Rostker v. Goldberg (upholding the exemption of all women from the military draft),

(d) Massachusetts v. Feeney (upholding veterans preference), and

(e) Dothard V. Rawlinson (upholding the BFOQ exception in Title VII employment law).

The evidence is also massive that ERA will apply the following Supreme Court decisions to the vast subject-matter of ERA:

(a) Bob Jones University v. United States (giving power to Internal Revenue Service to withdraw tax exemption from religious schools with rules contrary to public policy),

(b) Katzenbach v. Morgan (utilizing the enforcement clause to give vast powers to Congress and the federal courts).

It would be irresponsible to leave all these sensitive issues for the federal courts to decide. They are legislative, not judicial, issues. Whether individual Congressmen support one side or the other of these sensitive issues, we are entitled to know what ERA means before it is voted on. The only way we can know for sure is to add amendments to ERA to clarify what it means.

Postscript on State ERAs

Only six of the fifty states have amended their state constitutions with language identical to Section 1 of the proposed Federal ERA. Eleven additional states have added "sex" accompanied by various constitutional limitations which prevent an absolutist interpretation. Thus, 33 states have refused to include "sex" in their state constitutions, and 44 states have refused to include straightforward, absolutist Federal ERA-type language. Since the momentum turned against ERA in 1973, five states have defeated a state ERA in statewide referenda: Wisconsin, New York, New Jersey, Florida, and Iowa.

The Appendix to this testimony gives an analysis of the texts and experience of State ERAs in the minority of states which have adopted them.

STATEMENT OF
ELIZABETH L. CHITTICK
PRESIDENT, NATIONAL WOMAN'S PARTY

THE EQUAL RIGHTS AMENDMENT

Submitted for the record
Senate Committee on the Judiciary
Subcommittee on the Constitution

November 10, 1983

My name is Elizabeth Chittick and I am President of the National Woman's Party, the organization founded in 1913 by Alice Paul to seek equality under the law for women. Alice Paul led the fight for the suffrage amendment, enduring jail terms and force feeding, until the 19th Amendment was adopted in 1920.

In 1923, the National Woman's Party held a convention in Seneca Falls to commemorate this victory and to set an agenda for the future. Many of the women who had struggled to win the vote were disillusioned to find that it had not brought equality and that discriminatory laws and customs still restricted their role in society.

After hearing these concerns, Alice Paul asked if they wanted the National Woman's Party to adopt the goal of complete and absolute equality for women under the law. Later, she recalled in writing how "the whole audience rose up and said 'aye.'"

That platform position became a proposed Equal Rights Amendment which was introduced in Congress by two Republicans from Kansas, Senator Curtis and Representative Dan Anthony, nephew of Susan B. Anthony, the author of the suffrage amendment.

For 60 years the National Woman's Party has worked for passage and ratification of the ERA. That has been our special historical mission. For many years, we were almost alone in keeping it alive in Congress. Some women's organizations were afraid to lose protective state laws for which they had worked for such a long time. Alice Paul had the vision to see that eroding the principle of equal rights was too high a price for small favors.

Over the years, we have continued our task of educating the public and legislators on this issue, secure in the knowledge that any defeat is temporary and victory is inevitable.

The last time I spoke before the U.S. Congress in behalf of this Amendment was in 1978 and I had high hopes that victory was near. We lost that battle because of seven or eight men who controlled their state legislators, if that is possible. We now start the battle again but with more tenacity and time. Our loss is a gain in numbers of ERA supporters, both men and women. I am not bored or discouraged at having to testify again, but I am determined and more dedicated to the cause of the ERA than before. The simple text of this amendment, like the U.S. Constitution itself, has weathered the passage of time, but the climate in which we consider it has changed dramatically. Vast social and economic changes make its wording more pertinent, its passage more imperative, than ever.

One change is the increased entry of women into the work force and into all occupations. Women now make up almost half of all workers (43 percent). Their earnings help sustain the economy; their skills are vital to the nation's strength and progress. Women comprise nearly half the students in most of the law schools today, and they make up about a third of the students in medical schools. Those women cannot be persuaded to tolerate second-class citizenship.

Women are also more conscious of the economic impact of discrimination. While they have always worked to support their families, they are now more often the sole source of income. When they are denied opportunity, and a fair return for their labor, they do not suffer alone. Their children are condemned to poverty.

Discrimination on the job and throughout our institutions is a major, documented force in making women a disadvantaged group. Women see attempts to patronize or protect them as misguided or disingenuous, when their demand is not for special treatment but for fair treatment.

After many years of having the vote, women have organized and now use the vote more effectively to support candidates for public office who will enact legislation helpful to women. The election of 1982 was enlightening for candidates who discovered that the women's vote was a factor in their victory or defeat. Moreover, opinion polls since 1980 have disclosed an increasing "gender gap" reflecting women's readiness to vote for candidates who support their views on issues of special importance to women.

More political skills and more political clout translate into a greater respect for women's issues in congress and state legislatures. Now the overriding woman's issue is the need to secure for women a Constitutional guarantee of equality under the laws.

That guarantee does not now exist.

Our forefathers forgot women and blacks when they wrote the Constitution. That was consistent with the tradition of English Common Law which did not regard women as legal persons or entities. The 14th Amendment was necessary to ensure that citizens may not be denied equal protection of the laws on account of race; it does not provide the same unambiguous protection from sex discrimination. Susan B. Anthony invoked the 14th Amendment in seeking to exercise a citizen's right to vote. She was found guilty and sentenced to a fine for her efforts.

Some argue that court decisions since that time have expanded its coverage to women, but the Supreme Court has never ruled that gender-based distinctions are inherently suspect like those based on race. In fact, no consistent standard of review exists for sex discrimination cases. In place of the ambiguous patchwork of court interpretations we now have, the ERA would provide a clear standard for women's legal status. Currently, women must fight for their rights on a case-by-case basis. The burden in time and cost effectively denies remedy to all but a few.

An Equal Rights Amendment is needed to give women permanent equality under the law, unless and until the Supreme Court makes a decision that gender-based distinctions are inherently suspect. It does not create "equal rights" but equality under the law, quite a different thing.

It is not feasible to seek this equality statute by statute, or state by state. ERA would not, as critics charge, transfer authority from states to the federal government. It does not give the federal government any additional power to legislate in any areas reserved to the states. Both proponents and opponents agree that the Congress has authority now to enact any legislation needed to end legal discrimination. The only restriction the ERA imposes on state legislation is to require that it not discriminate on account of sex. If a law is restricted to women, it should also be restricted to men, or rescinded. Equality under the law is the issue.

In recent years, women's growing political power and the ERA debate have spurred a great many reforms in state and federal laws. However, these reforms are not uniform in every state and future state legislators could rescind or change them to the detriment and disadvantage of women. Public officials could relax the enforcement of laws and regulations with a shift in political winds. The ERA is needed to require all states and the federal government to review their laws and official practices and to revise those that do not conform to equality "under the law". Only an Equal Rights Amendment can ensure that this would be a permanent reform.

Women are a minority in the governing bodies and other powerful institutions in our country. They do not have the power or resources to protect their rights from adverse actions by legislatures and other governmental institutions. This is another reason women need the support of an Equal Rights Amendment.

Some opponents call the ERA a moral issue but the facts prove it is is a political issue. Moreover, it's a political issue where a miniscule minority of 7 or 8 men effectively blocked ratification of an amendment favored by the majority of their colleagues.

Only by declaring the ERA a moral issue could the Mormon Church openly oppose it. Some of this opposition was fright that women would become too powerful in the home. They wanted men to remain heads of household. The answer to this argument is that the ERA does not pass the front door of any home. Personal relationships in the home are private and the ERA cannot affect these relationships.

Some of the industries opposing ERA, i.e., the insurance companies, do so from an economic viewpoint. Equality and fairness of rates for women would cost them a great deal of money, but higher rates for women have helped make these companies wealthy.

Every poll shows that an overwhelming majority of Americans favored equal rights and still do, even in those states where ERA was not ratified. They do not believe basic rights should depend on gender or state of residence. Equality of rights under the law is an American birthright not a state or local matter.

Those who opposed women's suffrage argued for a state-by-state approach, and the same argument is made regarding equal rights. Then, as now, some states took the lead in expanding women's rights. Currently, 17 states have passed equal rights laws or have such provisions in their Constitutions. These states provide a laboratory that has helped move the equal rights debate from speculation to experience.

Senators from those states have testified that the laws work to the advantage of both men and women. Their state laws have not invalidated rape laws, outlawed separate toilets for men and women, or legalized marriages between homosexual partners, and they have not denied women the right to support by their husbands.

Their laws have strengthened marriage as a legal and economic partnership, increased the rights and security of homemakers and all women through changes in divorce, property, and retirement laws and greater access to credit, housing and employment.

Why have none of the sensational predictions of ERA opponents materialized in those sixteen states?

Because the opponents' emphasis on social issues is a tactic to divert attention from the basic issue of the legal status of women.

I hesitate to give credence to these arguments by repeating them but it is vital to create a clear and unambiguous legislative history so that there can be no doubt of Congressional intent, and the basic legal issues will not again be obscured by irrelevant debate on social mores and private lifestyles.

Women need equal legal status in order to secure equal treatment and consideration in work opportunities, pay and conditions; in their treatment by the civil and criminal justice systems; in the right to establish a business, become guarantors, enter into contracts, inherit and administer estates and protect themselves against ill health and old age.

It is often, and incorrectly, stated that no one knows what impact the ERA will have, if passed. That is simply not true. Before passing the ERA in 1972, the Congress created an excellent legislative history which was to guide the courts in interpreting the law according to the intent of Congress. The 1972 majority report of the Committee on the Judiciary noted that the legislatures of the states would be required to revise those laws that conflict with the ERA. It was specific in the changes envisioned.

For example, any labor law that was truly protective would be extended to include both sexes, while laws that were restrictive would become null and void.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex unless sex is a "bona fide" occupational qualification. However, Title VII does not cover all employment and it does not provide the permanent protection of a Constitutional prohibition against sex discrimination. Actions under that statue are a guide to the impact of ERA. For instance, a state overtime wage law was extended to include men (Potlatch Forests, Inc. v. Hays, 1970) as were weightlifting limitations (Bowe v. Colgate-Palmolive Col., 1969). On the other hand, state laws banning women from an occupation have been struck down. (McCrimmon v. Daley, 1970).

With respect to criminal law, the Amendment would prohibit a state from providing for different punishments for men and women who commit the same crime (Commonwealth v. Daniel, 1968). But it would not invalidate laws that punish rape, for such laws are designed to protect women in a way that they are uniformly distinct from men.

With respect to education, the Equal Rights Amendment would require that State supported schools at all levels eliminate laws or regulations or official practices which exclude women or limit their numbers. The Amendment would not require quotas for men and women, nor would it require that schools reflect the sex distribution in the population, but it would require admission on some other basis than sex, such as ability. A similar result may be expected with respect to the distribution of scholarship funds. State schools and college currently limited to one sex would have to allow both sexes to attend. Employment and promotion in public schools would, as in the case of other governmental action, have to be free from sex discrimination.

On the other hand, the Equal Rights Adendment has nothing to do with homosexual marriages, or abortions, or separate bathrooms and dormitories. In fact, laws pertaining to marriages are state laws and it is unlikely that many state legislatures would pass laws permitting homosexual marriages. In the state of Washington, where the constitution includes the ERA and prohibits discrimination because of sex, the courts have ruled that a marriage license can be issued only to a man and a woman. The state's prohibition of same sex marriages in no way conflicts with the constitutional guarantee of equal rights for both sexes. (Singer v. Hara, 522 P. 2d 1187 (Wash App 1974).

Similarly, we reject attempts to establish a connection between the Equal Rights Amendment and abortion. Supporters of equal rights include groups and individuals on both sides of the abortion issue. The legislative history shows Congress did not intend the ERA to affect state abortion laws; it made clear that laws which apply to only one sex would be constitutional under ERA when they were based on physical characteristics unique to one sex, which childbearing unarguably is. The Supreme Court decisions making abortion legal (Roe v. Wade and Doe v. Bolton) were based on wholly different constitutional questions, of privacy and due process, rather than equal protection.

The bathroom and dormitory issues are equally frivolous. One can only assume that those who fret over the prospect of unisex toilets are utterly unaware of the Constitutionally guaranteed right of privacy. At least two Supreme Court decisions uphold this right (Griswold v. Conn. and Roe v. Wade).

A valid concern is the effect of the ERA on the draft. But even here the issue is clouded by misunderstanding. Congress already has the power to draft women. The Constitution grants Congress unrestricted power "to raise and support armies ... to provide and maintain a navy."

Every person is subject to be called for military duty in the public safety. It is for Congress to say when, who, and to what extent and how they shall be selected (Warren v. U.S. 177 F. 2d 596 (1949).

In fact, just before the end of World War II, Congress was considering several bills to draft women. One would have drafted all unmarried, unemployed women. The other, a bill to draft nurses, had passed the House and had been reported favorable by the Senate Military Affairs Committee.

The Equal Rights Admendment does not affect this power, and it would permit women to volunteer for service on the same basis as men now do. It would also give women greater access to the benefits of service, including veterans' preference in and out of government work; free food, housing, insurance, training, and leadership experience; and educational assistance.

The decisions on exemption and deferment would rest on factors other than gender. Congress could exempt women, as it does men, on the grounds of family responsibilities, handicaps, conscience or whatever basis it found appropriate.

In short, the Equal Rights Amendment is a logical and an inevitable application of values fundamental to a democratic society. Let me summarize again some of the reasons why we need a Constitutional guarantee of equality of rights under the law for women:

- To give Constitutional force to the moral judgment that sex discrimination is wrong;
- To make all states and federal governments revise discriminatory laws, such as Social Security laws that are unfair to the families of women workers.
- To prevent future discriminatory laws from being passed.
- To establish the principle that a homemaker's services have economic value; and, in general, to remove gender-based presumptions and burdens, to allow family law to respond to needs and contributions of family members as individuals and not as stereotypes.
- To ensure equality of opportunity in public schools and state universities.
- To make equal opportunity and privileges available to women in government, employment, in prisons and in the military.

These proposals would not alter personal relationships or family structure. They are not revolutionary. In fact, future generations will marvel that more than half of our population waited so long and patiently to achieve the simple justice of equal treatment under the law.

STATEMENT

BRIGADIER GENERAL ELIZABETH P. HOISINGTON, USA RETIRED

Former Director, Women's Army Corps

EQUAL RIGHTS AMENDMENT AND THE MILITARY

I came here today because of my continuing deep concern about the effect the passage of the proposed Equal Rights Amendment would have on women and on our military forces. I spent 29 years in the Army--five of them as the Director of the Woman's Army Corps--and I just cannot conceive how the Army could accomplish its mission if it were required to have a force of half men and half women--which is what the Equal Rights Amendment would do..

I have used this example before and I want to emphasize it again. Can you imagine a fighting line where every other link in the chain is a weak one? That's what passage of this proposed bill would do to us. I do not believe our commanders, our forces, or you, would have confidence in sending such an Army against our enemies.

Do you realize that no other country in this world uses its women in combat roles? We would be the laughing stock of the world. I think it would make us look ridiculous and that would surely injure the prestige of the United States.

From spending 29 years involved in administering, training, and working with women, I know that the overwhelming majority of them cannot match men in aggressiveness, physical stamina, endurance, and muscular strength in long-term situations. In a protracted engagement against an enemy, soldiers without these capabilities would be weak links in our armor. Soldiers must have confidence in the long-term mental and physical stamina of their comrades.

Also, we must consider the consequences of mixing men and women in units and in combat situations. Problems in man-woman relationships exist everywhere--combat would be no exception--but there it would be disasterous in that it would cause costly distractions. There is more to fear in combat than being killed. The peripheral dangers are everywhere, before and after the battle--being raped by stronger or temporarily crazed comrades; being taken prisoner of war and being abused, beaten, raped, and starved; being disfigured in face or body; the psychological after-affects. We know these things occur on battlefields and most of them have happened to the men we have sent into combat. Being in combat has had devastating effects on family lives--can we expect our women who have served in combat to return home, bear and produce and raise healthy, happy American kids?

There are many other career opportunities for women in the armed services without including them in combat training and combat duties. Administrative, communications, medical care, and logistical technicians comprise 90 percent of the military manpower jobs--combat takes only 10 percent of the total force. When such rich opportunities exist in the Services for women, why in the name of equal opportunity or whatever, must we destroy the defense capability of our armed services so much and perhaps lose our whole country. Is it because we want to be able to say, "Well, we may have lost the war and lost our freedom but wasn't it swell--we gave our women equal opportunity on the battlefield?"

No thanks--I do not want to lose this wonderful country of ours because some men and women who do not have the foggiest idea of what it is like to serve in combat say that we should let women go anywhere, do anything, because it makes them equal. We need an all-male combat force. I do not want to take a chance with being protected by an experimental force. Why destroy a system that has preserved and protected our country for 208 years?

We cannot listen to people who think it is a matter of justice to let women be drafted and serve in combat. This is not a matter of simple justice that can be determined by a court or by a referendum. It is a matter, ladies and gentlemen, of common sense and whether we are going to preserve the things our nation stands for.

We need to listen to men who have actual knowledge of wars and combat duty. Ask these men about their experiences on the battlefield. Does combat require great endurance and stamina? Can women compete in hand-to-hand combat situations? Can women endure the emotional and psychological impact of their comrades being killed or themselves being disfigured for life? Ask any combat-experienced officer or enlisted man if he wants his daughter, his sister, or even his mother assigned to HIS combat unit.

I oppose the Equal Rights Amendment because it would have an adverse affect on the ability of our Army to do its job. The proposed bill would require equality in everything--women would be equally vulnerable to registration, the draft, and duty in combat divisions.

Under this bill the Secretary of the Army, for example, would no longer have the authority to decide how many or what percentage of the Active Army should be women--he would be forced to have a 50-50 ratio of men and women. Could the Army defeat our enemies under such circumstances? It is too dangerous to expose ourselves to such a risk. I urge you not to approve this bill that would weaken the defense posture of the United States armed forces. Thank you.

TESTIMONY OF MARY LAWLOR OF WINNETKA, ILLINIOIS ON ERA AND THE MILITARY

Mr. Chairman: Members of the Sub-Committee:

I am Mary Lawlor of Winnetka, Illinois. I served as a WAC lieutenant in the European Theater of Operations in World War II, landing in Normandy behind our American fighting men on D+90. My concern is with the bad effect ERA will have on national defense. Specifically, I have a strongly held view that women should not serve in combat positions in the U.S. Army, as ERA, according to generally accepted legal studies, would make them eligible to do.

In 1943 I enlisted in the Women's Army Auxiliary Corps (later the Women's Army Corps) on my twenty first birthday. At that time the recruiting pitch was "Join the WAAC and release a man for combat."

Thirty years later, in 1973, I was shocked to learn that Congress had rejected specific proposals to amend the ERA to exempt women from the draft and from combat. Since then I have learned that there are many other flaws in ERA which I'm sure will be covered by other witnesses.

Today my aim is to convince the Sub-committee that ERA should be rejected because of its deleterious effect on the military. The Defense Department should not be forced to go to court to demonstrate that putting women in combat would interfere with national security; Congress should make that decision. I am convinced that those who take a contrary position are motivated by reasons other than that of improving our national security. They seek to attain a type of so-called "equality" that is impractical, unrealistic, and would hurt both sexes if put into operation.

When I was on Omaha Beach during World War II, up to my knees in mud, there was no agitation among the women soldiers to be allowed to go into the front lines, nor, I'm sure, did anyone ever consider using American girls in combat despite the shortage of male replacements. Today I have listened hard, but I hear no chorus of voices from the female uniformed personnel within the Army demanding this type of service, nor do I detect a change in the attitude of the Department of Defense based on recent decisions on the utilization of women in the Army made by Assistant Secretary Korb in conjunction with the Department of the Army (as reported in the Washington Post on 10/18/83).

Because our form of government in vulnerable to concentrated pressure from special interests which do not always act in the common good, and because the Army is a disciplined organization, the Army becomes an ideal vehicle to be used by a small group, not representing a majority viewpoint, whose principal objective is social change.

Obviously the purpose of the Army is to fight, and not to force changes in our society, especially when such changes do not have universal acceptance.

While it may be argued that a woman has the right to serve in the Army wherever she is qualified, and ERA will give that right, we must remember that the vast majority of those in ground combat would still be male. Such men have a countervailing right to have women excluded. If they are not excluded unit effectiveness will suffer. Certainly American citizens sent to war should be able to expect from their government the right to serve in combat units that are properly trained, equipped and organized.

An important point that impressed me during my command of WAC's was that when the women worked together or were isolated, so to speak, there was greater efficiency. As soon as the boy-girl relationship came into play there was an almost instant shift to role playing. Suddenly there was more attention to appearance and less to the job. I believe that this sexual awareness cannot be disregarded merely by saying--"see, now you are all equal." The fact of the matter is that even if we were equal we would still not be alike--and for that I am grateful.

In a combat situation where teamwork is so important the fewer the complexities in interpersonal relations, the better.

We hear the complaint that women must be allowed to serve in combat roles so the top echelons of command will be available to them. This is a specious argument. General Eisenhower never heard a shot fired in anger prior to World War II, and there are many other high ranking officers who are in the same position. If the Army insists that women must serve in combat to attain high rank, then the selection processes need revamping. The talents needed to be a logistics or strategic planner are different than those needed to engage in combat. The higher the rank, the more far fetched is a combat requirement.

We also hear the statement made that members of the Army Nurse Corps served in the front lines; therefore it should not be world shaking if women became infantry riflepersons. The comparison, of course, is a poor one. Nurses surely have been subjected to small arms fire, but the fulfillment of their mission of aiding medical doctors is meant to be undertaken in an area protected from enemy fire. Furthermore, a nurse, like a doctor, is designated as a noncombatant. As such she is not normally subjected to the intense exposure to the enemy that close combat units are, and has certain privileges under the Geneva Convention.

My more specific objections against the concept of women in combat are:

It conspiciously disregards our culture. While I was in the European Theater when a crisis arose the men instinctively became protective of the women. Despite a deliberate program of defeminization now being inflicted on women recruits, under combat conditions an instinct so old as mankind will not change. The experience of the Israeli army bears this out (as reported in the Chicago Tribune of 9/8/76). During the Arab-Israeli war the men reacted with extreme shock at seeing women's bodies mutilated, much more so than seeing men injured. The Israelis have, of course, abandoned the folly of utilizing women in positions requiring close contact with the enemy.

Next: Women bear children. Should the United States adopt the questionable policy of the utilization of women in combat and close combat support roles it will be alone among major nations. The concept of presumed total equality between men and women was initiated by the Soviet Union in the time of Lenin. Though Russian women, because of the shortage of men, aided in the defense of their country in the front lines during the second World War, the present front line Russian infantry units, I am told, are all male--despite over sixty years of presumed equality.

In the event of war against our most likely enemy it is fair to assume the enemy infantry will be men. If captured in the jungle of close combat the combat or combat-support woman soldier might well be exposed to all sorts of indignities by men who have been denied female companionship for a long period.

I wonder also with how much common decency an enemy will deal with captured women prisoners.

As a matter of fact, large numbers of security personnel were needed on Omaha Beach to protect the women I commanded, not from the enemy, but from our own men.

The sexual act obviously can have a much more lasting effect on women than on men. For this reason, and because women are generally weaker than men, they have a right to expect extra protection. This is denied a woman in combat operations.

Finally: There would be serious complications in human relations. We cannot compare the life and death situation of front line combat with the commingling of the sexes in the rear echelon, especially with the low proportion of female to male that will exist on the front lines. Relationships will be formed that could complicate daily operations. We must remember we will be dealing with men and women who have been separated from their spouses for long periods of time.

Impartial leadership and the equitable sharing of dangers are necessary to success in combat. These qualities could be endangered. The penalty in the rear areas is one thing; the loss of life that could result in the front lines is another.

It is an accepted principle that "male" bonding is important in warfare. Soldiers don't fight for their country; they fight for one another--for Mom, apple pie, and the girl back home. To deprive the military services of the simple expedient of treating the sexes differently flies in the face of common sense.

In conclusion: The great 19th century sociologist de Tocqueville, whose writings today more vividly than ever reflect the strengths and weaknesses of our great land, supports my reasoning as follows: I quote--"There are people ...who confounding...the different characteristics of the sexes would make man and woman into beings not only equal but alike. They would give to both the same functions, impose on both the same duties...They would mix them in all things...It may readily be conceived that by thus attempting to make one sex equal to the other, both are degraded, and from so preposterous a medley of the works of nature nothing could ever result but weak men and disorderly women."

I thank you for your attention.

471 Hill Road,
Winnetka, IL
60093

November 7, 1983.

The Hon. Don Edwards, Chairman,
House Judiciary Committee,
Subcommittee on Civil & Constitutional Rights,
Rayburn Office Building,
Washington, D.C. 20515

Dear Mr. Edwards:

On the occasion of my testimony to your committee October 26th on the role of women in the military under the proposed ERA, Mrs. Schroeder asked if I had supporting evidence regarding the use of women in the Israeli Army. She stated that there was difficulty getting the correct story. I respectfully request, therefore, that the following be appended to the record of the hearings and included in the Committee print.

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An Israeli Governmental Informational pamphlet dated May 30, 1977, *The IDF (Israel Defense Forces) Spokesman*, reads as follows:

> "During and prior to establishment of the State of Israel women took Part in Jewish military forces. In the War of Independence women fought alongside men, undertaking operational missions in the front line. Today, of course, the girls of Chen* have changed and Chen girls play purely noncombatant, though thoroughly essential, roles within the IDF framework."

*Chen is the Hebrew acronym for Women's Corps; the word means grace, loveliness or charm.

The Israeli Army, by Edward Luttwak and Dan Horowitz, (Harper & Row, 1975), states on p.30:

> "In the war of Independence the Pulmach, I.Z.L. and Lihi did include girls in the fighting units, but few were actually involved in combat after the early stages of the war. After the Armistice combat duty was excluded right from the beginning of the new Israeli Army."

A History of the Israeli Army (1870-1974), by Zeev Schiff (translated and edited by Raphael Rothstein, (Simon & Schuster, 1974) states on p.119:

> "Although women often fought with men in the partisan military units of pre-Statehood days, today the women soldiers carry out non-combat functions. They are trained in the use of light arms for self-defense, but are not assigned to forward battle areas. During the Yom Kippur war, for example, female soldiers were immediately evacuated

from the Golan Heights on the Syrian front and from camps near the Suez Canal."

(p.119) "The recruitment of women in the Jewish society of Palestine stemmed from the pressure of circumstances, rather than an ideological impulse to achieve full equality between men and women."

(p.122) "Israel's small but vocal women's liberation movement has attacked the Army for placing women in noncombatant desk jobs, but their criticisms have elicited little response on the part of the women soldiers."

The Chicago Tribune of 9/8/76 Tempo section, p.2, article headlined "Painful Query: Can Women Take Combat?" reads in part as follows:

"Prince* said the Israeli Army, in which women are combat troops, had the experience of women being wounded and killed in battle and that 'the men reacted with extreme shock at seeing their bodies mutilated, much more than seeing men injured'."

*U.S. Army Major Howard Prince, clinical psychologist who headed the cadet counseling center at West Point 9/8/76, the time the article was written.

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Request acknowledgment of receipt and that this will be included in the printed record of the Subcommittee hearings.

Sincerely yours,

Mary Lawlor

Copies to all Subcommittee Members

PRISCILLA RUTH MacDOUGALL
ATTORNEY AT LAW
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August 5, 1983

Orrin G. Hatch
Chair, Subcommittee on the Constitution
Senate Judiciary Committee
Senate Russell Building #114
Washington, D.C. 20510

Re: Equal Rights Amendment -- Effect on Women's and Children's Names

Attention: Steve Markman

Dear Senator Hatch:

It is my understanding that your committee will be conducting hearings on the effect of the Equal Rights Amendment in September. I have worked extensively in the area of women's and children's names since 1972 and can assist you in your consideration of the Amendment in this area. In addition to this letter, which I would like included in the official records of the hearings, I would like to testify personally and answer any questions you may have in detail.

Women's Names

A married woman's using her own surname is not a "horrible" which would result from the passage of the Amendment. Women, under the common law and in every state, have the right to simply not change their names because of marriage. No state requires a married woman to use her husband's name or a divorced woman to use her ex-husband's name.

Nationally the misunderstanding which has existed about the law of women's names derived principally from the 1972 case of Forbush v. Wallace[1] which was corrected by the Alabama Supreme Court unanimously in 1982 in State v. Taylor.[2]

The enclosed brief in a Florida name change case outlines the law of women's names. For all state and federal purposes--driving, voting, passports, professional licensing, credit, etc.--a married woman has the right to use her own name. Cases such as the enclosed involving name changes are always reversed on appeal without constitutional assistance.

Thus the passage of the ERA will have little if no effect on the law of women's names. The only state to have a statute requiring a married woman to adopt her husband's name, Hawaii, repealed its law in 1976. Of course any state requirement that a woman adopt or use her husband's name would be invalid under the Amendment, if there were any. The custom of married women not changing their names at marriage or otherwise not using their spouses' surnames is, however, very common. Of all the legislation introduced on women's names over the past ten years, I know of only one (unsuccessful) bill which would have required a married woman to use her husband's name for any purpose.

Children's Names

The law of naming children is a bit more complex, but the "horrible" of marital children not using their fathers' surnames as a matter of law would not be one of the consequences of the Amendment. Under the common law parents have the freedom to name their children with any first, middle and last names they choose, and this right is respected nationally.[3] A few states (five) have had statutes requiring marital children to be given their fathers' names on their birth certificates, but these have all been repealed or invalidated as unconstitutional infringements on parents' rights to rear their children.[4]

Similar statutes requiring nonmarital children to be given their mothers' surnames on their birth certificates will be invalidated as they are litigated under present constitutional law.[5]

No state requires that children be known after birth by any particular surname. Naming children is a parental right.

Where parents are in disagreement over their children's names, however, the courts everywhere, except in California,[6] honor a primary right in the father to control the naming of children originally given the father's name. While the judiciary is gradually moving towards a recognition of women's rights to name newborn or very young children over the fathers' objections, where the children are older they are uniformly closing their doors to women. Last year the United States Supreme Court refused to review the case of a divorced woman seeking to give her children, 7 and 9, a hyphenated surname of both her and her ex-husband's names over the objection of the father.[7]

The Equal Rights Amendment would invalidate any superior naming right of the father over children of any age. It would invalidate any presumption that marital children's best interests are served by use of their father's name. It would invalidate any presumption that continued use of the father's name, when the father wants it retained, is in the children's best interests over the wishes of the mother and children.

Without the Equal Rights Amendment women and children will have an uphill battle in having their rights recognized over the traditional superior right of the father to control the naming of marital children.

I welcome the opportunity to testify or to supply you with further information.

Sincerely,

Priscilla Ruth MacDougall

PRM:fh
Enclosure

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[1] 341 F. Supp. 217 (M.D. Ala. 1971), aff'd. per curiam, 415 U.S. 970 (1972).

[2] 415 So.2d 1043 (Ala. 1982).

[3] *Sec. of Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 366 N.E.2d 717 (1977); *Doe v. Dunning*, 87 Wash. 2d 50, 549 P.2d 1 (1976).

[4] *Sydney v. Pingree*, No. 82-8291-CIV-JAG (S.D. Fla. Dec. 17, 1982); *O'Brien v. Tilson*, 523 F. Supp. 494 (E.D. N.C. 1981); *Jech v. Burch*, 466 F. Supp. 714 (D. Hawaii 1979).

[5] *Doe v. Hancock County Board of Health*, 436 N.E.2d 791 (Ind. 1982) (Hunter, J. dissenting).

[6] *In re Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980).

[7] *Application of Saxton*, 309 N.W.2d 298 (Minn. 1981), cert. denied, 102 S. Ct. 1737 (1982).

Statement of Paige Comstock Cunningham, Esq.

THE EQUAL RIGHTS AMENDMENT AND ABORTION

Introduction

Mr. Chairman, and members of the Subcommittee, my name is Paige Comstock Cunningham. I am presenting this statement in my capacity as Executive Director and General Counsel of Americans United for Life and the AUL Legal Defense Fund. The AUL Legal Defense Fund is the only public interest law firm in the nation that devotes its full-time efforts to litigation involving the right-to-life issues of abortion, infanticide, and euthanasia.

I would like to point out that the views I express on the propriety of an Equal Rights Amendment (ERA) are my own. Americans United for Life is neutral with respect to the ERA, apart from its implications for abortion. AUL is not a political organization, and is not involved in lobbying. I am here today only to testify to the legal effect of the Equal Rights Amendment on abortion.

For purposes of identification, I am a graduate of Northwestern University School of Law, and an attorney. My articles on abortion have appeared in several periodicals, including Update, a journal of the American Bar Association. I am co-author of a monograph on the abortion decisions rendered by the Supreme Court this summer. My comment on a religious freedom issue appeared in the Northwestern University Law Review.

* * *

As an individual, attorney and woman, I endorse the principle of equal treatment of women under the law. No class of citizens should be excluded from constitutional guarantees of equal protection. As a pro-life advocate, I believe these fundamental rights extend to the class of the unborn, both female and male. It is therefore with dismay that I must conclude that the proposed ERA, intended to fill the gaps in eliminating discrimination against women, may also be used to buttress and amplify the "right to abortion."

STATEMENT

In my legal opinion, the plain language of this proposed constitutional amendment does not require any connection with abortion rights or funding. However, it is instructive to examine the intentions of ERA advocates which, in the absence of a clear legislative history, could affect how the amendment is interpreted. These intentions have been made clear in legal arguments made under equal rights provisions in state constitutions.

In 1980, the Civil Liberties Union of Massachusetts (CLUM) filed a complaint in Moe v. King, arguing that state refusal to fund abortions violated the Massachusetts Equal Rights Amendment.[1] Although the Massachusetts court did not address the ERA argument, it upheld tax funds for abortions under due process guarantees.

The CLUM is a state affilate of one of the most prominent groups to support ERA ratification. The executive director explained the decision to pursue abortion funding under the state ERA:

> Because a strong coalition is being forged between the anti-ERA coalition and the anti-abortion people, it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the state Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in McRae was the last straw. We now have no recourse but to turn to the State Constitution for the legal tools to save Medicaid funding for abortions.[2]

It is thus clear that an equal rights amendment could be a potential vehicle for attempts to require tax funding of abortion.

Moe v. King is not unique. In 1978, several physicians attempted to intervene in a case where Hawaii Right to Life sued the State of Hawaii to stop funding abortions. On behalf of the physicians, the American Civil Liberties Union argued that,

> Applicants' first claim to reimbursement as a matter of right rests on the Hawaii Constitution's guarantees of due process and equal protection and Article I, Sec. 21 which provides that "equality of rights under the law shall not be denied or abridged by the state on account of sex." Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex.[3]

The Motion to Intervene was denied, and the court did not address the equal rights argument, but abortions still are tax-funded in Hawaii.

And in Fischer et al. v. Commonwealth, Dep't of Public Welfare,[4] a case that is still being litigated, the American Civil Liberties Foundation of Pennsylvania argued that:

> Pregnancy is unique to women. 62 P.S. §453 and 18 Pa. C.S.A. §3215(c) which expressly deny benefits for health problems arising out of pregnancy, discriminates against women recipients because of their sex. 62 P.S.§453, 8 Pa. C.S.A. §3215(c) and the regulations issued pursuant thereto constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment, Article 1, §28 of the Pennsylvania Constitution.[5]

It is true that none of these cases have held that the state equal rights provisions make abortion immune from state regulatory control or require abortion to be funded by the State. On the other hand, no court has ever denied that such equal rights provisions do have an impact on abortion policies. Quite simply, we have no direct judicial guidance on this matter.

But we do have the comments of ERA proponents regarding their intentions. Leading ERA interpreters Thomas Emerson of Yale Law School, former Columbia Law School Professor Ruth Bader Ginsburg (now a federal judge), and others argued in an amicus brief in G. E. v. Gilbert that pregnancy classifications under the ERA would be subject to strict scrutiny, and "would not survive the ERA. . . ."[6]

Abortion and childbirth, according to Justice Brennan in a dissent joined by Justices Marshall and Blackmun, "are simply two alternative medical methods of dealing with pregnancy."[7] Thus, an abortion regulation, under this line of reasoning, would be a pregnancy-related classification, and thus unconstitutional under the ERA.

It is therefore quite obvious from these cases and comments, that abortion advocates would attempt to employ a federal ERA as a basis to argue anew that abortion must be funded by both the States and the federal government. It is also clear how their argument would proceed: Since restrictions on abortion practices or abortion funding affect women, but not men, they constitute a form of invidious discrimination against women and are, therefore, unconstitutional.

An analogy suggested by Professor Grover Reese of the University of Texas School of Law is instructive. Suppose that a State forbade treatment for sickle cell anemia or refused to fund such treatment although it funded every other form of medically necessary care. Let us further suppose that only black people could acquire sickle cell anemia. It might easily be argued then that such legislation constitutes a form of discrimination based on race since it affects only blacks. Since classifications in the law based on race are inherently suspect,[8] they are subject to strict judicial scrutiny. Hence, such legislation could be upheld against constitutional attack only in the exceedingly unlikely event that there exists some compelling state interest that would justify the discrimination inherent in such legislation and that the legislation would be narrowly drawn only to satisfy that interest.[9]

In similar fashion, it would be argued that restrictive abortion legislation affects only women--now a "suspect class" for equal protection purposes under the new ERA. Hence, it would certainly be claimed that only some compelling interest could justify this form of discrimination. Since, in accord with Supreme Court decisions, there exists *no* compelling interest that justifies significant regulation of abortion, at least until the point of viability,[10] abortion laws and funding restrictions must fail.

It is true that the Supreme Court has held that state and federal governments may choose to restrict abortion funding.[11] But these decisions were based on the premise that such restrictions did not involve a "suspect class." The ERA, by making classifications based on sex inherently suspect, might thus be employed to reverse prior Supreme Court decisions warranting government restrictions on abortion funding.

It is also true that the Supreme Court has already held that almost all state restrictions on abortion practices are unconstitutional under the Fourteenth Amendment to the U.S. Constitution. The ERA is hardly needed to establish the existence of the "right to abortion" that already undercuts almost every direct state restriction on abortion practice. Nevertheless, the ERA could certainly create another constitutional hook on which the Court could hang "abortion rights." Abortion proponents could add "violation of the ERA" to their claims that abortion restrictions violate constitutional guarantees. Even the minimal power that the State presently maintains to regulate abortion could be lost. Moreover, should the Supreme Court some day consider reversing its decisions recognizing a right to abortion under the Fourteenth Amendment, the ERA could represent an alternative basis for maintaining the continued existence of such a right.

This analysis is not intended to imply that the ERA *of necessity* would reverse court decisions acknowledging the right of governments to refuse to fund or facilitate abortion practices, to abrogate further the power of government to restrict abortion practices, or to provide some alternative basis for recognition of a right to abortion. By the better reasoning, the ERA would do none of these things. Restrictions on abortion or abortion funding are universal and facially neutral--they apply to both men and women.

They would affect men, if men could bear children. That they do not affect men is not a circumstance that arises as a result of state action, but due to biological fact. It cannot be logically argued that any discriminatory effect that arises as the result of restrictive abortion laws is caused by the State in enacting such laws, and the ERA represents only a restriction on the power of the State to discriminate between the sexes. Therefore, the ERA would have no effect whatever on the authority of the State to restrict abortion practices or funding if normal logic and usual principles of constitutional adjudication prevailed.

But, of course, it is too often the case that the judiciary twists logic and refuses to apply proper principles of constitutional analysis in order to achieve a preferred result. Indeed, the law of abortion is a striking example of this process. The development of the "abortion right" can only be understood in the context of the current judicial bias that abortion should not be controlled by the State. The present law of abortion cannot be rationalized simply by reference to the text or history of the Constitution. And, unfortunately, the ERA provides an additional weapon in the crusade for permissive abortion.

In the present climate, it is highly likely that the courts would develop a sex-based discrimination test that measured the disparate impact of an abortion law, rather than a test that simply measured the extent to which a law created or embodied discrimination by its terms. At the very least, it is certain that the ERA would deepen the courtroom hostility against abortion legislation in view of the obvious fact that such laws affect only one sex. In the volatile world of abortion litigation, such a mere change in climate is enough to destroy entirely the power of the State to regulate abortion and, indeed, enough to generate a new body of law that compels the State to positively encourage the practice by funding and facilitating it.

If you wish to avoid the result of the ERA directly implicating abortion funding and abortion rights, then, in my legal opinion, there are several options.

First, new language might be offered as a substitute for the present language which expresses abstract idealism but is also exceedingly vague and open to various interpretive abuses.

Second, a specific disclaimer which denies that the ERA implicates abortion might be added to the present language.

Third, in my legal opinion, clear, absolute, and unequivocal legislative history to the effect that the ERA may not be construed to affect the power of government to restrict abortion practices, to refuse to fund or facilitate abortion practices, or to impliedly recognize a right to abortion should suffice. This third method of removing any implication that ERA affects abortion law by legislative history is offered with considerable hesitation.

As an individual, I am well aware that at least some proponents of the ERA regard permissive abortion as the cornerstone of sexual equality, rather than demanding that society accomodate female reproductive capacity. There is no doubt this branch of the feminist movement would prefer that there be no legislative history regarding the ERA's effect on abortion, or that its legislative history be vague and ambiguous, so that once in the hands of the friendly judiciary the ERA could be used as a sword to deprive the government of any remaining authority to restrict abortion or abortion funding and as a shield to defend the right to abortion against erosion or collapse.

It is also the case that the judiciary may disregard legislative history that is only slightly unclear in order to reach some preferred result. Only an utterly unambiguous record that cannot be avoided by the judiciary--a record that would require intellectual dishonesty to ignore--could suffice.

At the very minimum, such a legislative history would contain the following elements.

First, the Committee Reports in both the House and Senate must state unequivocally: (1) that the ERA is not intended and may not be construed to establish, affirm, or expand any right to abortion; (2) that the ERA is not intended and may not be construed to affect or alter in any way any power of the local, state, or federal government to restrict or prohibit any abortion; (3) that the ERA is not intended and may not be construed to compel any private individual, any individual acting under color of law, or any local, state, or federal government to participate in, fund, or otherwise facilitate in the performance of any abortion; and (4) that the reason that the ERA does not in any way affect or alter the power of government to restrict abortion or abortion funding and does not compel any private individual or state actor to facilitate performance of any abortion is because the ERA is solely intended to forbid only discrimination by the State as between the sexes and, further, that any discriminatory impact that might result from any abortion restriction arises on account of the sole capacity of the female to bear children and not as the result of state action.

In addition, the House and Senate sponsors should specifically inform the memberships of each body on the record and immediately preceding their vote on the ERA of each of the same elements that are in the Committee Report. A preferable alternative would be a Resolution enacted the same time as the ERA, reciting the elements of the Committee Report.

In my legal opinion, failure to recite any element in either Committee Report, failure of the sponsors in either the House or the Senate to recite plainly all the elements on the floor in the manner described, or failure of either the House or the Senate to enact a contemporaneous Resolution with these elements included, would render the legislative history of the ERA suspect, and would implicate abortion rights.

To state generally for the record that there is no relationship between the ERA and abortion without the emphases and specifics that I have described would not be adequate. Casual recitation of the fact that no court has so far held an equal rights provision to implicate abortion will not prevent future courts from holding that it does. The charges and counter-charges made in the public debate on ERA and the ambivalent testimony before this Subcommittee demand that the legislative history made by the Congress be in the nature of a directive to the courts which will subsequently construe the ERA that they are forbidden to find that it implicates abortion because to do so would be contrary to the expressed intent of its framers, sponsors, and those who voted to enact it.

There are those who would protest that nothing short of a specific disclaimer included within the plain language of the ERA suffices to assure that the judiciary will not subsequently employ this Amendment as a vehicle to expand or to secure permissive abortion. In my legal opinion, a careful study of the canons of judicial construction makes it clear, however, that only a patently corrupt judiciary with no sense of honor or propriety would or could choose to disregard the unambiguous legislative history I have described. The plain language of the ERA does not speak to abortion. Thus, the judiciary would be compelled to construe the ERA in light of its legislative history.[12] Committee Reports are regarded as particularly illuminating guides to legislative intent.[13] Likewise, the clear statements of sponsors and contemporaneous Resolutions of enacting bodies are given great weight.[14]

Similarly, there are those who might claim that the history of the ERA is too muddled and uncertain on this issue to be cured by remedial legislative history of the kind I have described. But the public debate on possible implication of abortion by the ERA by its advocates and opponents in the absence of a clear legislative history is one thing. The expressed intent of the ERA by the Congress--the body that would make legislative history--is quite another. In my legal opinion, the rigorous, unambiguous legislative history I have described will effectively put the matter to rest.

In the absence of any contrary or ambivalent expressions in the official record, the combined legislative history I have described would, in my view, warrant the good faith conclusion of any objective observer that the ERA could not be construed to affect abortion law. A judiciary that is so disreputable that it would disregard or distort such a history could far more easily distort some other provisions of the Constitution to accomplish the same result. From this point of view, if a firm legislative history is inadequate to prevent the judiciary from employing the ERA to expand or to secure permissive abortion, then neither would plain language in the ERA disclaiming any effect on abortion law be adequate.

CONCLUSION

The language of the ERA does not, on its face, implicate abortion. However, in view of positions taken by abortion advocates under state equal rights provisions, the views of leading ERA proponents, and the decisions of the judiciary in abortion-related matters, this potential connection is obvious. Only new language, a specific abortion disclaimer, or a rigidly drafted legislative history assure that this result will not occur.

Otherwise, the federal courts would have a blank check to intepret the ERA in the abortion context as they choose--a result that as an advocate of the right to life for all human beings I must oppose.

Footnotes

1. Complaint, *Moe v. King*, S. Judicial Ct. of Mass., Civil No. 80-286 (filed *July 9, 1980*). The relevant part of the Massachusetts Constitution reads, "*Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.*" *Mass. Const.*, Pt. 1, Art. 1, amended by the One Hundred and sixth article of Amendment, approved Nov. 2, 1976.

2. "From the Executive Director's Desk" column, Civil Liberties Union of Massachusetts *Docket*, Aug., 1980, p. 8 .

3. Memorandum in support of the Motion to Intervene, *Hawaii Right to Life v. Andrew J.T. Chang, et al.*, Circuit Court of the First Circuit, State of Hawaii, Civil No. 53567 (filed May 11, 1978).

4. 444 A.2d 774 (1982).

5. The complaint was later amended to include the ERA argument. Pa. Commw., No. 238 CD 1981. The case is scheduled for trial in late November 1983.

6. Brief for Women's Law Project and American Civil Liberties Union as *amici curiae* at 21, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

7. *Beal v. Doe*, 423 U.S. 438, 449 (1977) (Brennan, J., dissenting).

8. *McLaughlin v. Florida*, 37[illegible] U.S. 184 (1964).

9. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

10. *Id.*, at 163.

11. *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980).

12. 2A Sands, *Statutory Construction* §48.01 (1973), and the cases cited therein.

13. *Id.*, at §48.06, and the cases cited therein.

14. *Id.*, at §§29.03 and 48.15, and the cases cited therein.

TESTIMONY OF ELAINE DONNELLY

THE EQUAL RIGHTS AMENDMENT AND INSURANCE

Mr. Chairman and Committee members, I am grateful for this opportunity to speak to you as a woman who has been researching and debating issues of concern to women for more than 11 years. I am a political activist, a former member of the 1980 Reagan/Bush Campaign's Women's Policy Advisory Board, and a present member of the Michigan G.O.P. Economic Equity Commission. I have been a regular commentator on WJR Radio in Detroit for the past 8 years, and I am a self-employed consultant on media access strategies and techniques (Donnelly Media Associates)

I am very pleased to be accompanied here today by Mr. Paul Barnhart, F.S.A., M.A.A.A., an independent consulting actuary who is regarded by his professional colleagues as the leading health insurance actuary in the United States. Mr. Barnhart does not speak for any association, committee or organized group, and in particular not for the insurance industry. He is an expert on the rights of the buyers of insurance. As Past President of the Society of Actuaries (1978-79) and and 1981 Chairman of the Society's Health Insurance Section, Mr. Barnhart has been very influential in bringing about lower, more equitable rates for women in disability and major medical insurance.

I am here because I believe in the right of women to think, speak, and vote for themselves on the issues that touch their lives. This is why I am so strongly opposed to the so-called Equal Rights Amendment, which would usurp the right of women to vigorously oppose the doctrinaire, wrong-headed definition of women's rights that has been promoted for years by groups like the National Organization for Women.

Five weeks ago, on September 14, I listened while Ms. Judy Goldsmith, President of the National Organization for Women, testified on behalf of H.R. Res. 1, the resurrected ERA. Although there were many controversial issues that she and her colleagues raised during the course of that hearing, I would like to zero in on one statement in particular. On page 12 of Ms. Goldsmith's written testimony, it reads:

> "As a constitutional ban on sex discriminatory laws, the Equal Rights Amendment will outlaw, or support legal challenges to end, sex discriminatory price and payout abuses by insurers, employers, and government..."

Ms. Goldsmith is absolutely right in her prediction that unisex insurance would be one of the inevitable results of ERA, but she is absolutely wrong in implying that the results would be beneficial to women.

Back in 1972, when the first ERA was voted on by Congress, statements like this one were made and often quoted, without anyone knowing what the meaning would actually be in the "real world". But 11 years later, we no longer have to speculate. I am here to bring you some hard information about how the grand-sounding concept of unisex insurance works in actual practice.

THE MICHIGAN EXPERIENCE

I am a resident of Michigan, one of the four states with a unisex insurance law in effect. Michigan's Essential Insurance Act forbids auto insurance companies to use "sex" and "marital status" as factors in setting auto insurance rates.

The law was passed in late 1979 (eff. January 1, 1981) after a debate that primarily focused on the bill's prohibitions against insurance "redlining" in certain urban areas. There was virtually no public notice or debate on the implications of the few words inserted into the bill to eliminate "sex" and "marital status" as factors in the setting of home and auto insurance rates. Before young women drivers in Michigan knew what had happened, many of them began getting letters from their insurance companies announcing rate increases of hundreds of dollars.

One of these young women, Kim Dove of Detroit, wrote a letter last May to Congressman John Dingell of Michigan, describing what the unisex insurance law meant to her (copy attached). Kim is married, the mother of two children, and living on a low income. Even though she has an almost perfect driving record, her insurance company informed her that because of Michigan's unisex insurance law, her rate would be raised from $156 per year to $365 per year - an increase of over 125%.

Mrs. Dove shopped around to try to find a lower rate, but all the companies she talked to quoted the same high rates for the comprehensive coverage she used to have. She has therefore been forced to settle for minimum coverage with a high-risk company, and she feels dangerously under-insured. If she has an accident, the other party would be covered, but she and her family would not be. In her letter, Mrs. Dove asks:

> "Who is going to take care of my family and pay the bills if I should have a serious accident with this kind of minimum coverage? The answer is no one. I don't feel free to use my own car, even for necessary trips to the doctor with my children. It is demoralizing and disheartening to have to ask others in my family to go out of their way (to drive me) but I simply can't afford to take chances."

Mrs. Dove has found out the hard way that unisex legislation mandates unfairness to women in the setting of auto insurance rates. Because of Michigan's law, young women all over the state are being arbitrarily denied the lower insurance rates that would otherwise be theirs. Instead of being treated as female individuals in a low-risk group, these young women have been thrown into a much larger "unisex" category - together with young men - and that forces them to subsidize the claims of high-risk drivers. This is neither fair nor equitable in the true sense of the word.

HOW UNISEX INSURANCE REALLY WORKS IN THE "REAL WORLD"

The full enormity of the Michigan experience can only be discovered by studying and translating the Michigan Insurance Bureau's official report entitled *A Year of Change - the Essential Insurance Act in 1981*. To my knowledge, it is the first report of its kind. The truth is obscured and disguised in a puzzle of insurance jargon (which was unfamiliar to me as a lay person), but I hope you will agree that it is important to consider all of the Report's code words and numbers before you vote on a constitutional amendment which could impose the same system on all 50 states.

Since I have no connection with the insurance industry, it took a bit of effort and a lot of questions before I was able to decipher the meaning of Exhibit V, on page 26 of the Report. I was told by an official of the Insurance Bureau that the relativity factor numbers listed on that page represent the risk classification of young drivers as compared to adult drivers. For example, a group of young drivers with a relativity factor of 2.00 are considered to be twice as likely to have accidents, based on statistical probabilities.

If the relativity factor of a group of single females was increased by a particular company from 2.00 to 2.95 under the new sex-neutral law, that translates into a percentage increase of 47%. I used a calculator to figure and write in all of the percentage changes, as shown on the enclosed copy of

Exhibit V (type-set and enlarged for the sake of clarity).

I noticed that Exhibit V displayed only 3 Tables - instead of 4. The Table of rate increases for young married females was missing. How strange that there was "no room" for the Table I suspected would show the steepest increases caused by the Michigan law. The missing Table could only be constructed by substituting a relativity factor of 1.00 in the first column (1980) for each group of single women. The resulting list of percentage increases is truly shocking.

As you can see, rate increases for young single women range between 13% and 127%, while young married women have had to choose between whopping increases like these: Auto Owners, 103%; Trans-America, 140%; State Farm, 160%; Allstate, 242%; and topping them all, Citizens Insurance, 327% - more than four times as much as the policyholder would have paid before the law went into effect. (married female, principal operator, under age 18)

What possible "social good" is served by rigging the insurance market against young women? It is a violation of the very essence of "civil rights" to inflict arbitrary, unjustified economic pennalties on whole classes of unsuspecting innocent people - in the name of "equality". As Kim Dove wrote in her letter:

> "I feel that many young women in this state are being unjustly overcharged like I am, and yet the women's liberationists are saying that I should be happy because of my new "equal rights" to pay high insurance premiums.
>
> "I'm all for women's rights, but I can't afford this kind of "equality", which is costing me a lot in terms of security and peace of mind."

True equity in insurance requires that companies base their rates on the principle of equal costs for equal risks, but unisex insurance imposes a higher cost on those who represent a lower risk. How can this be "fair"?

It's not surprising that the insurance companies aren't publicizing the Michigan experience; they don't want to draw attention to their soaring rates, and they are well aware that prior approval of rates by the Commission of Insurance is no longer required.

On the other hand, the Insurance Bureau is part of the problem too. The agency comes to the amazing conclusion that the first year of the Essential Insurance Act "indicate(s) a more positive atmosphere for consumers, and a distinct lack of the negative impact predicted by several representatives of the insurance industry" 1/

Between the insurance companies who are looking out for their balance sheets, and the State Bureau's false pride in the new law, not to mention the feminists who sponsored the law and can see no wrong in it - no matter what the facts are - no one is looking out for the interests of women who must pay an unfair price for this foolish social experiment. The full cost is falling not on insurance companies, but on young women, and even young married men, who are not in a position to pass the costs on to anyone else.

ANSWERS TO OTHER FALSE ARGUMENTS FOR UNISEX INSURANCE

The argument has been made before this SubCommittee that insurance companies ignore women's lower mileage and other relavant factors in the setting of auto, life, pension, and health insurance rates, and that the factor of sex is only used as an unfair substitute for other factors. But as Mr. Barnhart explains in his statement to accompany my testimony, mileage and other elements such as smoking, drinking habits, occupation, urban vs. rural living, driving record, and family health history are already used to determine fair insurance rates for both men and women.

Numerous studies have been done for State Insurance Bureaus and the Federal Department of Transportation which indicate that "mileage is not an effective substitute for sex (in setting auto insurance rates) since females have a demonstrably lower accident rate than males within each category of miles driven." 2/ (See attached Exhibits) No reasonable or valid "adjustments for mileage" can change these figures." 3/

The charge has also been made that insurance costs for women over 25 are the same as those for adult men, and that the ERA will somehow solve this problem. The fact is that it would do just the opposite. The reason is that if women's lower accident experience below age 25 counts for nothing under the ERA, then it follows that the same injustice would simply have to be

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1/ Transmittal Letter to accompany First Year Report, June 4, 1982

2/ Private Passenger Automobile Insurance Risk Classification: A Report of the Advisory Committee to the Nat'l Assoc. of Insurance Commissioners, May 1979; pp. 67-77.

3/ Study of California Driving Performance (Phase II), A Research Project of the Rate Regulation Division, California Dept. of Insurance.

continued for women after 25 as well.

At the present time, the trend is for companies to identify lower-risk groups and offer lower rates than competing companies. For example, some insurance companies offer a discount to single women over 30. That trend toward lower rates for consumers will be completely derailed, however, if insurance companies no longer have to base their rates on actual costs. This would be a great loss for consumers, not the companies.

NO BENEFICIAL TRADE-OFF FOR WOMEN

The credibility of the National Organization for Women has also been questioned for their making of unsupported or grossly exaggerated claims about the projected benefits of unisex figures in all kinds of insurance (life, auto, pensions, and health/disability insurance) For example, NOW maintains that women presently pay almost $16,000 more than men for a full range of insurance over their lifetimes. (See Table below)

In a letter to Business Week, however, Richard V. Minck of the American Council of Life Insurance points out several errors in NOW's calculations Since employers must provide all employees the same health and disability benefits, there is no cost differential for women in these cases.

Type of Insurance	NOW estimates[a] (The cost of female premiums compared to male premiums)	Minck's estimates[b] (The cost of female premiums compared to male premiums)
auto	-$1,640	-$1;640
health	+ 6,662	0
disability	+ 4,854	0
life	+ 5,856	- 3,210
TOTALS	+$15,732	-$4,850

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a. Source: "Sex and Insurance Policy," Business Week, February 7, 1983, p. 83.

b. Source: Letter to the Editor of Business Week by Richard V. Minck, Executive Vice President, American Council of Life Insurance, p. 2.

Contrary to the impression given by NOW's unusual and unrepresentative figures, women usually pay less for life insurance, because there is overwhelming evidence that women on the average tend to live about 7 years longer than men.

In fact, Minnesota Mutual (whose premium is cited) sold just three of these policies during 1982——and those to employers rather than to individuals. Minck chose as more representative a whole life policy and used the premiums of a company that sold over 300,000 such policies in 1981. With this popular policy a woman would save $3,210 on life insurance between ages 35 and 65. Combined with an estimated savings of $1,640 for auto insurance, individual women are actually saving almost $5,000 in insurance costs. These savings would be lost under a unisex system. 4/

THE COST OF RETROACTIVE PENSION FUND LIABILITIES

The testimony of NOW with regard to the effect of ERA on pension plans deserves closer scrutiny as well. Up until the recent Supreme Court decision in the case of Arizona v. Norris last July, about 2% of working women were receiving smaller monthly pension benefits than male retirees. (The female retirees' annuity option, chosen in lieu of a lump sum benefit equal to that of male employees, was figured on the actuarial fact that women tend to live longer; smaller benefits over a longer period of time averaged out to be roughly equal.)

Only 39% of all women in the work force are covered by pension plans, and 95% of those already had unisex pension plans and benefits before the Norris decision. (5% of 39% = 2% of working women) But the Norris decision has taken care of the problem for that 2% of women. The Supreme Court acted to give female retirees pension benefits equal to those of male retirees, but was careful not to strike down cost-based pricing for individually-purchased life and auto policies. This is the alleged "injustice" that NOW complains of, and it's important to analyze what would happen if NOW's view of "justice" prevails under the ERA.

Please remember that most pension, disability, and health insurance costs are covered by employers, which can use the advantage of a group rate to blend the actuarial differences between males and females. On the other hand,

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4/ For more information, see Heritage Foundation Issue Bulletin No. 95 July 5, 1983, Catherine England, Policy Analyst auto and life policies are usually purchased by individuals without the advantage of group rates. Therefore, women buying life and auto policies would have to pay much more in premiums, while women would gain nothing in the area of pension and/or medical benefits.

Please consider the results in human terms...What would unisex life insurance mean to a single mother, for example. After divorce a woman's standard of living goes down by 42% and a man's goes up. A woman is economically punished by divorce; it is the number one cause of poverty in this country. For this woman, life insurance is a necessity, not a luxury.

Along comes unisex insurance under the ERA. Suddenly, if she's 35 years old and a non-smoker, this woman will have to pay $350 more than she currently pays for a $50,000 term policy for one year. The most likely end to this story is that the woman will have to drop her insurance altogether, or reduce its value, rather than bear that burden. Just as Kim Dove had to give up her comprehensive auto coverage in order to afford the cost of unisex auto insurance, this single mother's family would be put in jeopardy. Would someone please explain how this woman will have been helped by unisex life insurance?

But that's not all there is to be concerned about here. NOW complains because the Norris decision didn't force the payment of retroactive costs, even though the pension plan in question had not been collecting reserves that would cover the costs of such retroactive payments.

If cities and states are required to "top up" their pension plans as NOW demands, the staggering costs would have to be borne by all the taxpayers, male and female alike. How much would this cost? For starters, consider the testimony of New York City Mayor Edward I. Koch on S. 372, the proposed "Fair Insurance Practices Act" (April 12, 1983). The Mayor testified that the cost of a "topped-up" retroactive unisex pension plan would come to about $862 million, $82 million in 1984 alone. That's the equivalent of 3,000 police officers, firefighters, or sanitation personnel.

In my own state, where pension benefits have already been averaged to a midpoint figure on a prospective basis, the cost of "topped up" benefits would amount to an estimated $30 million more per year – the equivalent of 900 police jobs, or 1,230 teachers. Coming from a state that is struggling with extremely high taxes and high unemployment, I take strong exception to the cavalier expectations and demands of NOW in this area.

In my opinion, the better strategy would be to amend ERISA, the federal pension law, in order to lower the age for pension benefit eligibility, and take other reasonable actions to increase the number of women workers and dependents who are covered under pension plans. If private businesses cannot afford retroactive pension benefits and other unreasonable burdens imposed by court order under an ERA, they will simply act to remove the annuity option altogether. That would be most harmful to female retirees and dependents alike.

THE REAL ISSUE

Once the determination is made that insurance rates need have no relation to factual statistics, then it would be only a matter of time before other legitimate characteristics - such as age, condition of health, or marital status - are barred from consideration along with sex in the setting of insurance rates. Indeed, proponents of unisex insurance have already targeted age and marital status as the next factors to be eliminated.

The issue is not that the insurance industry would collapse; most companies can just pass their costs on to the consumers. The real issue is the concept of true equity in insurance. Federally-mandated unisex insurance would create a government-enforced cartel by which the industry could overcharge everyone. If the insurance companies were sponsoring this concept, instead of the so-called "women's rights" activists, the whole idea would be greeted with howls of outrage from one end of the country to the other.

In summary, a constitutional amendment requiring unisex insurance would mandate unfairness, not end it. As the experience of Michigan has shown, it is a violation of a woman's civil rights to force her to pay high-risk insurance rates even though she represents a lower risk - all in the name of "equality". Application of the unisex principle to all kinds of insurance would increase costs for everyone, not reduce them.

This is one of the least-known effects of ERA so far, but one of the most important. Anyone who favors ERA but does not want it to impose unfair burdens on women in the area of insurance should certainly vote for suplementary language that would prevent that unfortunate result.

Your responsibility is great, and women all over the country are counting on you to analyze this issue very carefully. Please cast your vote for a true definition of equity in insurance, not a false one. Thank you.

INITIAL IMPACTS OF ELIMINATION OF SEX & MARITAL STATUS
Pre & Post Essential Insurance Young Driver Factors Applied to Base Rates

	Age 16			Age 18			Age 20			Age 23-24		
	1980	1/1/81	% Change	1980	1/1/81	% Change	1980	1/1/81	% Change	1980	1/1/81	% Change
				Single Females								
Principal Operators												
Auto Club	2.00	2.95	+47%	2.00	2.95	+47%	2.00	2.55	+27%	1.70	1.68	−1%
State Farm	1.55	2.60	+67%	1.55	2.60	+67%	1.55	2.60	+68%	1.35	1.70	+26%
Auto Owners	1.35	2.03	+50%	1.35	2.03	+50%	1.35	1.95	+44%	1.18	1.20	+2%
Citizens	1.88	4.27	+127%	1.88	4.27	+127%	1.79	3.85	+115%	1.00	1.00	
TransAmerica	2.12	2.40	+13%	2.12	2.05	−3%	1.82	1.80	−1%	1.00	1.25	+25%
Allstate	1.85	3.42	+84%	1.85	2.97	+60%	1.85	2.52	+36%	1.58	1.92	+21%
Occasional Operators												
Auto Club	1.60	2.00	+25%	1.60	2.00	+25%	1.60	1.80	+12%	1.30	1.45	+11%
State Farm	1.55	1.85	+19%	1.55	1.85	+19%	1.55	1.85	+19%	1.35	1.45	+7%
Auto Owners	1.35	1.54	+14%	1.35	1.54	+14%	1.35	1.36		1.00	1.08	
Citizens	1.44	1.98	+37%	1.44	1.98	+37%	1.35	1.71	+27%	1.00	1.00	
TransAmerica	2.12	1.70	−24%	2.12	1.50	−29%	1.82	1.20	−34%	1.00	1.05	
Allstate	1.51	2.45	+62%	1.51	2.32	+54%	1.51	2.12	+40%	1.41	1.92	+36%
				Single Males								
Principal Operators												
Auto Club	3.40	2.95	−13%	3.40	2.95	−13%	3.40	2.55	−25%	2.60	1.65	−36%
State Farm	3.65	2.60	−28%	3.65	2.60	−28%	3.65	2.60	−29%	2.80	1.70	−39%
Auto Owners	2.64	2.03	−23%	2.64	2.03	−23%	2.64	1.95	−26%	1.80	1.20	−33%
Citizens	2.99	4.27	+43%	2.99	4.27	+42%	2.56	3.85	+50%	1.00	1.00	
TransAmerica	3.82	2.40	−37%	3.82	2.05	−46%	3.41	1.65	−52%	3.00	1.25	−58%
Allstate	3.20	3.42	+6%	3.20	2.97	−7%	3.20	2.52	−21%	2.36	1.92	−19%
Occasional Operators												
Auto Club	2.25	2.00	−11%	2.25	2.00	−11%	2.25	1.80	−2%	1.60	1.45	−9%
State Farm	2.30	1.85	−19%	2.30	1.85	−19%	2.30	1.85	−19%	1.80	1.45	−19%
Auto Owners	1.80	1.54	−14%	1.80	1.54	−14%	1.80	1.36	−24%	1.48	1.08	−27%
Citizens	1.93	1.98	−2%	1.93	1.98	−2%	1.83	1.71	−6%	1.00	1.00	−39%
TransAmerica	2.88	2.40	−16%	2.88	2.05	−29%	2.59	1.65	−36%	2.06	1.25	−39%
Allstate	2.01	2.45	+21%	2.01	2.32	+15%	2.01	2.12	+5%	1.53	1.92	+25%
				Married Males								
Principal Operators												
Auto Club	1.95	2.95	+51%	1.95	2.95	+51%	1.95	2.55	+31%	1.65	1.65	
State Farm	1.85	2.60	+40%	1.85	2.60	+40%	1.85	2.60	+40%	1.30	1.90	+46%
Auto Owners	1.65	2.03	+23%	1.65	2.03	+23%	1.65	1.95	+18%	1.65	1.20	−27%
Citizens	1.71	4.27	+150%	1.71	4.27	+150%	1.71	3.85	+125%	1.00	1.00	
TransAmerica	2.23	2.40	+7%	2.23	2.05	−8%	2.12	1.65	−22%	1.82	1.25	−31%
Allstate	2.20	3.42	+55%	2.20	2.97	+35%	2.20	2.52	+14%	1.71	1.92	+12%
Occasional Operators												
Auto Club	1.95	2.00	+2%	1.95	2.00	+2%	1.95	1.80	+2%	1.65	1.45	−12%
State Farm	1.85	1.85		1.85	1.85		1.85	1.85		1.30	1.45	+11%
Auto Owners	1.65	1.54	−6%	1.65	1.54	−6%	1.65	1.36	−17%	1.65	1.08	−34%
Citizens	1.71	1.98	+16%	1.71	1.98	+16%	1.71	1.71		1.00	1.00	−42%
TransAmerica	2.23	1.70	−24%	2.23	1.50	−33%	2.12	1.20	−43%	1.82	1.05	−42%
Allstate	2.20	3.42	+55%	2.20	2.97	+35%	2.20	2.52	+14%	2.20	1.92	−11%
				Married Females								
Principal Operators												
Auto Club	1.00	2.95	+195%	1.00	2.95	+195%	1.00	2.55	+155%	1.00	1.65	+65%
State Farm	1.00	2.60	+160%	1.00	2.60	+160%	1.00	2.60	+160%	1.00	1.90	+90%
Auto Owners	1.00	2.03	+103%	1.00	2.03	+103%	1.00	1.95	+95%	1.00	1.20	+20%
Citizens	1.00	4.27	+327%	1.00	4.27	+327%	1.00	3.85	+285%	1.00	1.00	
TransAmerica	1.00	2.40	+140%	1.00	2.05	+105%	1.00	1.65	+65%	1.00	1.25	+25%
Allstate	1.00	3.42	+242%	1.00	2.97	+197%	1.00	2.52	+152%	1.00	1.92	+92%
Occasional Operators												
Auto Club	1.00	2.00	+100%	1.00	2.00	+100%	1.00	1.80	+80%	1.00	1.45	+45%
State Farm	1.00	1.85	+85%	1.00	1.85	+85%	1.00	1.85	+85%	1.00	1.45	+45%
Auto Owners	1.00	1.54	+54%	1.00	1.54	+54%	1.00	1.36	+36%	1.00	1.08	+8%
Citizens	1.00	1.98	+98%	1.00	1.98	+98%	1.00	1.71	+71%	1.00	1.00	
TransAmerica	1.00	1.70	+70%	1.00	1.50	+50%	1.00	1.20	+20%	1.00	1.05	+5%
Allstate	1.00	3.42	+242%	1.00	2.97	+197%	1.00	2.52	+152%	1.00	1.92	+92%

[illegible] Exhibit [illegible] in the Report published by the State of Michigan Insurance Bureau 1982 called "A Year of Change — The Essential Insurance Act in 1981." The percentages were all added by Elaine Donnelly as part of her testimony to the Senate Commerce Committee on April 12, 1983.

The "Married Females" table [illegible] was omitted from the published Michigan State Report so Mrs. Donnelly prepared this table based on Michigan Insurance Bureau figures.

[illegible]

[illegible] For those companies with factors that differ by coverage, only a simple average is used.

[illegible] These have been converted to age group factors by assuming that a driver with 0-1 years of experience is 16.

Exhibit 1
Sheet 1

ACCIDENT MEANS BY SEX AND ANNUAL MILEAGE

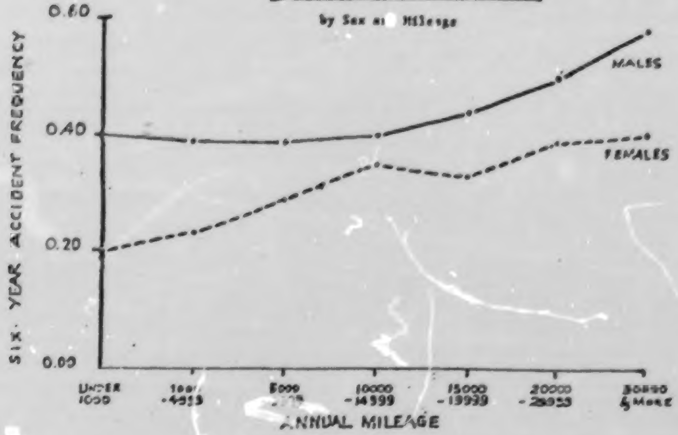
(Renewal applicants, 6 year record)

1975

	Annual Mileage								
	Under 1,000	1,000-4,999	5,000-9,999	10,000-14,999	15,000-19,999	20,000-29,999	30,000+	Mean Total Accidents	Total Miles
MALE	.40	.39	.39	.40	.44	.52	.58	.43	16,000
FEMALE	.19	.23	.29	.35	.33	.39	.40	.28	8,000

Exhibit 1
Sheet 2

ACCIDENTS PER PERSON



Source: California Driver Fact Book

9355 Pierson
Detroit, MI 48228
May 6, 1983

The Hon. John D. Dingell
House Office Building
Chairman, House Committee on
Energy and Commerce
Washington D. C. 20515

Dear Mr. Dingell:

I am angry. I am married, under the age of 25 years, and also the mother of two children. I have an almost perfect driving record. But in the year 1981, I received an announcement that my auto insurance rates were going to be raised from $156 per year to $365 per year - that's an increase of over 125% AAA told me that Michigan's new Essential Insurance Act banned sex and marital status in the setting of insurance rates, so I would have to pay more in order to "equalize" things. I understand that rates for young men were lowered, even though they have more accidents. Why should I suddenly have to pay so much more because of another group's high accident rate? This is very unfair to women, in my opinion.

When I found out that my rates were going up, I did shop around to try to find a lower rate, but all the companies I talked to quoted the same high rates for the comprehensive coverage I used to have with AAA. Mr. Dingell, we are on a very tight budget, and I realized that I would simply not be able to afford comprehensive coverage anymore. I have had to settle for minimum coverage with a high-risk company, and I feel I am dangerously under-insured. If I have an accident, the other party would be covered, but I and my family would not be. Who is going to take care of my family and pay the bills if I should have a serious accident with this kind of minimum coverage?

The answer is - no one. I don't feel free to use my own car, even for necessary trips to the doctor with my children. It is demoralizing and disheartening to have to ask others in my family to go out of their way to take me shopping for necessities or to the doctor's office, but I simply can't afford to take chances.

I feel that many young women in this state are being unjustly over-charged like I am, and yet the women's liberationists are saying that I should be happy because of my new "equal rights" to pay high insurance premiums. I'm all for women's rights, but I can't afford this kind of "equality", which is costing me a lot in terms of security and peace of mind.

I am writing to you because I understand that you are sponsoring a bill to sex-neutralize insurance in all 50 states. I think you should remember, Mr. Dingell, that passage of your bill would cost young women like myself a lot of money, and many of us simply can't afford it.

Unisex insurance may sound fair, but I don't think it is fair at all to charge more for young female drivers, and less for the young male drivers who are more likely to have accidents.

To me, this system is unfair, and I hope you won't impose this problem on young women in all 50 states.

Sincerely,

Kim Dove

Kimberly Dove

CC: Members, House Committee
on Energy and Commerce

STATEMENT
OF
CHARLES E. WIGGINS

ON THE EQUAL RIGHTS AMENDMENT

Mr. Chairman and Members of the Committee

My name is Charles E. Wiggins. I am an attorney practicing law in Washington, D.C. with the firm of Pierson, Ball & Dowd. I served for 12 years as a member of the House Judiciary Committee. The views I express today are my own.

Approximately thirteen years ago, your chairman and I sat in this room to hear the testimony of the lead-off witness - Martha Griffith, as I recall - on a proposal to add what was then, and now, known as the Equal Rights Amendment to the Constitution.

Much has transpired in those thirteen years.

The Amendment, after vigorous debate, was reported by our Committee to the House where it passed easily by the requisite two-thirds vote. The Senate took similar action. And it was submitted to the states for their necessary ratification. As we know, the Amendment was ratified quickly by approximately one-half of the states. Some were so eager to be the first to ratify that their action was preceded by no signification debate at all. In any event, the movement to secure quick ratification stalled, and at the end of the seven year period prescribed in the resolution for ratification, the proposed Amendment remained several states short of the necessary number to ratify. Then, by extraordinary and unprecedented action, the Congress, by majority vote, extended the term for ratification by three years without resubmitting the measure to states which has previously acted. In those three years, the measure did not receive the endorsement of the states, thus avoiding an interesting constitutional challenge which would have cleared the air on the question of recissions and the power of Congress to extend the period of ratification by majority vote.

But more has occurred during those thirteen years than debate over ratification. Everyone, I believe, has become more conscious of the simple unfairness of many laws which have deterred women, as a class, from realizing the potential which some individually are eager and able to achieve. State legislatures have reacted and laws have been amended or enacted to achieve gender neutrality. Some states have adopted Equal Rights Amendments as a part of their own constitutions.

This Congress has also responded, exercising its powers presently found in the Constitution and which are far more potent than the proposed Equal Rights Amendment - or the Equal Protection Clause, I might add.

The Supreme Court, too, has moved to assign several unfortunate seventy year old precedents to the dust heap of history. Under current law, any classification of women for disparate treatment must demonstrate a special justification to be sustained as constitutional in the face of an Equal Protection challenge.

And we should not neglect the cumulative impact of private actions, beyond the reach of government, which reflect a steady movement toward a proper recognition of the role of all persons, men and women, as participants in human affairs, without discrimination.

In sum, we have come along way, Mr. Chairman, in these thirteen years in realizing many of the goals of those who support the Equal Rights Amendment to the Constitution.

Whatever remains to be done, and which can fairly be characterized as a legitimate objective of the E.R.A., is well within the power of government to achieve without tinkering with the Constitution.

The E.R.A. is basically a prohibition against one type of governmental action - discrimination on the basis of sex. Congress can end all gender distinctions within its vast legislative jurisdiction any time it chooses to do so. States, as well, are fully empowered to eradicate the blight of irrational discrimination against women, or all gender distinctions for that matter, at any time they choose to do so. And such action can be taken by a simple majority vote. The problem, of course, is that some fear that legislative solutions may lack permanence and may be undone by legislative majorities or administrative action in the future, unless permanence is ensured by a constitutional amendment.

Constitutional limitations are specifically designed to protect individuals from the tyranny of majority rule. It matters not that the danger of oppressive governmental action is remote. It is enough if history has shown that certain threats to individual freedom have occured in the past, and the people, by amending their constitution, wish to avoid that risk in the future.

Perhaps that is the essential justification for the E.R.A.: to ensure that future majorities do not turn back the clock to reinstitute irrational gender based distinctions in their public laws.

I could support this objective, Mr. Chairman, if it could be achieved sensibly. I concluded thirteen years ago that the text of the Amendment was not a sensible means for doing so. I concluded that our present constitution, particularly the Fourteenth Amendment, was fully adequate to the legitimate needs of all our people for fair treatment. Nothing has occured in the interim to alter my conclusion, and indeed recent decisions of the Supreme Court interpreting the Fourteenth Amendment have fortified that conclusion.

To state my reasons, I must, of necessity, cover familiar ground, so I shall be brief.

Obviously, our constitution is amended for the purpose of changing it. Accordingly, all must accept that the E.R.A., if ratified, will not, and should not, be construed as a mere reformulation of the Fourteenth Amendment. It must mean something else.

As we all know, the Fourteenth Amendment in its command of "Equal Protection" does not mandate that government treat all people the same. It requires only that different treatment be justified. On that basis, government with full constitutional authority has distinguished in its laws between rich and poor, young and old, and any number of other classifications. The quantum of governmental justification is not uniform. As to some classifications - race most particularly - the level of judicial scrutiny of the reasons for the classification is so exacting as to defy in most cases any proper classification at all.

To condense 115 years of constitutional law under the Fourteenth Amendment into one sentence: government must treat its people equally, unless it has a justifiable reason for not doing so.

The proposed Amendment begins, "Equality of rights under the law . . ." The key word is "Equality". What does it mean? How will it be construed in the future? I believe it cannot mean that government must treat men and women equally, unless it has a justifiable reason for not doing so, for this would be a mere restatement of existing constitutional law. Thirteen years ago, I pressed witnesses on this question and was told repeatedly that the word "equal" in the E.R.A. was intended to mean "the same treatment" or "identical treatment" for men and women, except for those very limited situations where laws were enacted dealing with physical characteristics unique to one sex only. I believe this interpretation remains the generally understood and agreed meaning of the word "equal" in the Equal Rights Amendment.

I am mindful that some contend that the absolute equality standard is not the proper one for interpreting the E.R.A. Some of its advocates claim that the sense of the Amendment is to elevate sex to a suspect class, on the level of race. I am mindful as well that some state courts construing similar language in their own constitutions have opted for a rational basis test, thus thoroughly gutting the Amendment of all but symbolic meaning. The record over the past 13 years is rife with a variety of interpretations. However, I am convinced that the most authoritative and reasoned statements, coupled with many other statements in various records, leads one to the conclusion that the Amendment will be, or there is a serious risk that it will be, construed as adopting an absolute prohibition against classifications based on sex, except where unique physical characteristics are properly involved, and that exception will be subject to strict scrutiny.

This construction, necessary to set the Amendment apart from the Equal Protection Clause, is the central vice of the Amendment and the basic reason it did not, and should not, survive ratification by the states.

To require the Congress, and each state legislature, to enact laws in which all men and women are treated the same, notwithstanding compelling reasons for not doing so, is to forfeit good sense on the altar of symbolism.

It is not my purpose to parade the horribles before this Committee, but I wish to give only two examples, which are within the special province of Congress, to demonstrate particular points.

Perhaps at the core of the legitimate complaints of women, as a class, is economic discrimination, particularly in hiring, job placement, promotion and compensation. As I read the Amendment, and its history, if it means anything, it means this: No federal job will be the special preserve of either men or women. Applicants must be judged without regard to sex on the basis of their personal qualifications alone. On this standard, I cannot foresee *any* job for which *some* men and *some* women will not be equally qualified; and if so, hiring or job assignment must occur without regard to sex, thus, to some degree, integrating on the basis of sex the *entire* federal work force. This is a clearly foreseeable, and by many, intended consequence. There may be no great mischief (indeed, there may be positive advantages) if this occurs, as a matter of constitutional necessity, in *most* cases. But in *some* cases, the public interest will suffer, and the Constitution will allow for no exceptions.

The most troublesome problem is job assignments in the military. It is contrary to good sense and jeopardizes our national security interests to compel the integration of all units on the basis of sex. My military background is in the infantry, both in garrison and in combat situations. The job of an infantry man in combat is not one in which civility plays much of a role. Fatigue, fear, obedience, strength, endurance and team work are the relevant personal factors. I have no doubt that an infantry platoon, integrated with a half-dozen or so exceptional women, could fight, but I also have no doubt that it could not fight as well, or have the same chance of winning, as one composed only of men. At the rifle platoon level, combat can become much like an athletic contest. An integrated team of men and women will almost certainly lose to one composed only of men if the only rule of the game is survival.

Moreover, personal relationships should not be permitted to develop at such a level which may interfere with command decisions.

So far as I know, no nation has ever gone so far as to compel the integration of its front line forces on the basis of sex, and we should not do so.

A second illustration. Presumably, both men and women would be integrated into our federal prison system, both as guards and as prisoners. I believe all will concede that some functions are best performed by either men or women, especially in dealing with prisoners of the same sex. How would such a gender-based job assignment square with the constitutional amendment? Some say that the E.R.A. would not overcome other constitutional protections, such as the constitutionally based right of privacy, and that recognition of such privacy interests would tolerate appropriate gender based job assignments.

I believe this argument misconceives the nature of the right of privacy. The right of privacy is not owned by the government to be asserted by it against nonconsenting individuals. It is a personal right. In short, I may protect my privacy, under certain circumstances, against governmental action; the government may not do so on my behalf, if I don't claim this right for myself.

In a prison situation, who can be too sure that a group of prisoners of either sex would not actively seek an integrated guard structure, or that a particular male guard would not actively seek assignment bringing him into intimate contact with consenting female prisoners? The government may be offended by such intimacy, but I am not so sure it can justify a disregard of the command of the E.R.A. on the basis of the government's claim of a privacy interests.

The claim of a privacy exception to the E.R.A. is no more persuasive in other situations which have been discussed by others.

If this Committee must report out the Equal Rights Amendment, as I suspect that it will, it should not surrender its duty to examine the text critically out of a fear that the ghost of the late Senator Hayden will arise to attach a rider to the language of the Amendment. In particular, there is no excuse to leave the reach of this Amendment uncertain as it applies to "persons" and "citizens". The Constitution uses both terms. The Amendment is silent as to which is intended. The Committee should make it explicitedly clear whether classifications on the basis of sex with respect to noncitizens will be tolerated under the Amendment by inserting the word "person" or "citizen", as you deem appropriate, in the text. Thirteen years ago, Mr. Chairman, you characterized my efforts to make this change as a frivolous attempt to take animals out of the Amendment. I hope you will now see that an effort at constitutional clarity is not a frivolous act.

But more importantly, the Committee should do more than merely clean-up the text of the proposed Amendment. It should reexamine the legitimate ends of its sponsors and, if you concur that those ends are worthy and require a constitutional amendment to achieve, carefully craft an Amendment which achieves your purposes without unacceptable consequences.

Such an Amendment is possible. The rigidity of the present text has stalled ratification for 13 years. If the Congress tenders to the States the same rigid formulation of "identical treatment" of men and women, without regard to compelling circumstances dictating different treatment, the supporters of the Amendment will fare no better in the next 13 years.

I suggest, if you have lost confidence in the Fourteenth Amendment as a guarantee of fair treatment for both men and women, that you draft an Amendment which elevates sex classifications to the same level of judicial scrutiny as that enjoyed by race, but (unlike the Fourteenth Amendment) subject to such exceptions as you deem proper. Although I dislike the specificity which such an Amendment would require, as a matter of constitutional form, I see no escape from that necessity unless you are willing to embrace the full consequences of decisional law interpreting the Fourteenth Amendment in the face of claims of racial discrimination.

There are many reasons why you would not wish to accept settled constitutional doctrine as applied to race in the case of sex. I do not foresee the Congress or State Legislators enacting a host of laws ending veterans preferences or tax exempt status for single sex colleges, for example, but it is clearly predicable, if the race cases are a criterion, that endless litigation will ensue leading to probable results in specific cases which this Congress, acting separately, would never countenance.

However, I am personally satisfied that one troublesome area which exists under the absolute standard would evaporate (after a few years of litigation) if a strict scrutiny standard were adopted. The draft, of course, would have to apply to both men and women. But, I am satisfied that assignments within the military on the basis of sex could be sustained if the standards for assignment were carefully tailored to ensure combat effectiveness. Very, very few other sex classifications could be expected to survive under a strict scrutiny standard, however, unless specifically exempted by the Amendment itself.

I do not advocate such a detailed Amendment to the constitution. I would prefer to rely upon the Fourteenth Amendment. But if the words "Equality of rights under the law shall not be denied or abridged . . . on account of sex" are to be added to the Constitution, you must act to reverse the weight of history that such words shall require gender distinctions to be judged on the basis of an absolute standard; and must limit the application of a strict scrutiny standard as well, so as not to produce unintended and irrational results.

I have said enough. We all know that the E.R.A. has become a symbol and a symbol with considerable political significance. I fully understand the importance of symbols, particularly political symbols, and can support them so long as they remain symbolic and to not become the basis of compelling action which common sense dictates should be avoided.

If the present text is resubmitted to the states, it will, in my opinion, be a symbolic act done largely for political reasons. If that be done, I am confident that good sense will again prevail, and the Amendment will be rejected by the states.

STATEMENT OF

HENRY C. KARLSON, PROFESSOR OF LAW
INDIANA UNIVERSITY SCHOOL OF LAW

ON

The Impact of the Equal Rights Amendment
on American Society

Mr. Chairman and Members of the Committee:

This Committee is performing an important service to the nation in attempting to determine the legal implications of the Equal Rights Amendment. I say "attempting to determine" as the language of the amendment has been subjected to a multitude of different interpretations by equally competent legal scholars. A definitive understanding of its total impact on the law and culture of the United States is impossible to obtain. The only really clear implication that arises from its legislative history is that the term "equal rights" was not haphazardly chosen. Its use was a carefully calculated rejection of the term "equal protection" used in the fourteenth amendment. The hundred plus years of Supreme Court decisions defining and interpreting the term "equal protection" are therefore of little value in any attempt to discern the impact of a mandate for "equal rights."

I am honored that the Committee has given me the opportunity to express my views on the impact the Equal Rights Amendment will have on our society. I will focus my remarks upon the possible effect of the amendment in three areas of national concern.

Military Service

Article I Section 8 of the United States Constitution authorizes Congress "to raise and support Armies . . . to provide and maintain a Navy." There is general agreement among both proponents and opponents of the E.R.A. that it will have a pervasive impact upon this critical Congressional power. Both the language of the amendment, and its legislative history lead to the same conclusion. The amendment does not permit different treatment of the sexes with regard to either voluntary or involuntary military service. An amendment to the E.R.A., offered by Senator Ervin, that would have permitted women to be exempted from compulsory military service was defeated on the Senate floor.

In light of the experience of other nations which have experimented with the use of women as combat troops, the wisdom of the amendment's demand that women in the military be treated the same as men is open to question. Israel in its experiment found that women in combat have significantly higher casualty rates than their male counterparts. It was also discovered that men in combat units that included women had higher casualty rates than similarly situated men in all male combat units. Based upon these and other findings the government of Israel enacted legislation that prohibits the use of women as direct combat troops. If the E.R.A. becomes part of the United States Constitution, Congress would not have that option.

If the E.R.A. is enacted, it will be necessary to create some sex neutral method for assigning military personnel to combat units. What at first appears to be an effective and appropriate method, physical testing, becomes upon analysis at best a useless exercise. A test is only effective when the individuals taking it have some motive or desire to do well. Although a number of individuals, both male and female, may have a strong desire to risk their lives in combat and live under the spartan physical conditions of a combat unit in the field, many have no such aspirations. In the event of a military draft, the group both male and female that would not desire to serve in combat will in all probability be rather large.

During the Vietnam war, men drafted into involuntary military service were motivated to do well on their physical training tests by the spector of being required to continue basic training in a "motivational platoon" until they passed their tests. The conditions in a motivational platoon were of a nature that made the possibility of combat appear the lesser evil. If the E.R.A.'s mandate that men and women must be treated the same in the military becomes part of our Constitution, either continued basic training for men unable or unwilling to pass the physical tests necessary for combat qualification must be discontinued, or women who are unable to pass the same tests must also be subject to unending basic training in motivational platoons. This would probably be a majority of women called for military service.

In the event that Congress should find it necessary to reinstate a military draft, the E.R.A. would create great difficulty in dealing with married couples that have children. Although several alternatives for dealing with this problem would exist, each would have a negative impact on either the nation or the ability of the United States to raise a combat force. Congress could, for example, provide that neither parent be subject to the draft. Our experience in past wars indicates that a broad exemption of this nature would greatly reduce the number of people subject to the draft and have a negative impact upon the ability to raise an army. Although in theory, Congress could require that both parents be drafted, and their child or children be put in a foster home or a government institution, in light of the great harm this would inflict upon many children it does not appear to be a viable alternative.

A future selective service law might provide that in the circumstance of a married couple with children, only one of the parents would be drafted. Unless a sex biased, and therefore under the E.R.A. unconstitutional, criteria is used to determine which parent would be drafted, one half of those exempted from military service would be males. Even proponents of the E.R.A. agree that on the average men are more likely to be endowed with the physical strength and stamina necessary for combat than women. Exclusion of a large number of males from selection for military service would reduce the ability of a military draft to provide individuals suitable for use as combat troops.

A unique physical characteristic shared by most young women, but no men, is the ability to voluntarily become pregnant. In light of the Supreme Court's decisions dealing with the right to an abortion, pregnancy must be considered a voluntarily maintained physical condition. In the military service, particularly in time of war, this ability to assume and maintain the physical condition of pregnancy permits a woman who does not care for her assignment to voluntarily disable herself. Although a pregnant woman may throughout most of her pregnancy be able to carry on some military duties, particularly in the last months she is not suited for combat duty. My experience as a former military judge gives me the authority to state that many males would never have served in combat if they had the ability to voluntarily disable themselves without any adverse legal or social consequences. I am personally aware of several instances where women in the military become pregnant with the intent of forcing a change in their duty assignment. If females are truly to be treated the same in military service as males, it will be necessary to impose some legal sanctions upon women in the military who permit their pregnancy to continue and thereby voluntarily incapacitate themselves.

Abortion

One of the more sensitive questions dealing with the impact of the E.R.A. upon United States jurisprudence is the effect the amendment will have upon legislation dealing with abortion. It is my considered opinion that all legislation attempting to limit the right to an abortion, or to restrict the use of public funds for purposes of abortion, with one possible exception, will be invalidated by the E.R.A. The only exception would be for legislation limiting the ability to obtain, or at least, restricting the method that could be used, in the case of abortions performed after a child in the womb has reached the point where it could continue to exist independent of its mother.

The Hyde Amendment presently restricts the use of federal funds for purposes of abortion. In Harris v. McRae, a scant majority of the United States Supreme Court ruled that the Hyde

Amendment was not a violation of the due process clause of the fifth amendment. In reading this determination the Court followed its usual two-tiered analysis. First the Court determined the legislation did not violate any constitutionally protected right. There is no constitutional right to a tax funded abortion. Then the Court looked at the second issue and found that the law did not discriminate against a suspect class. If the E.R.A. had been part of the Constitution at the time the Court decided Harris, it is doubtful the same result would have been reached.

Legislative history of the Equal Rights Amendment reflects congressional intention that there be a two-level standard of judicial review. First, general classifications based upon sex are per se outlawed. Second, physical classifications purporting to deal with physical characteristics unique to one sex are subject to strict scrutiny. The ability to become pregnant is a physical characteristic unique to females. In order to uphold a legislative determination that the physical condition of pregnancy should be treated differently, insofar as relates to public funds allocated for medical treatment, then other physical conditions common to both males and females or unique to males, the court would be required to find some compelling state interest that could only be met by the distinction. In light of the 5 to 4 opinion in Harris, it is unlikely that the court would find the necessary compelling state interest.

Other legislation that encroaches upon the ability of a woman to obtain an abortion would also be constitutionally suspect if the E.R.A. were adopted. It would in all probability prohibit states from imposing on abortions any restrictions more severe than those placed upon sexually neutral operations. A physician or nurse employed by a public hospital, or in light of the Supreme Court's recent decision in Bob Jones University v. Regan perhaps any hospital granted special tax consideration, could be compelled to participate in or perform abortions. Conscience laws which have been enacted by various jurisdictions to protect the religious freedom of choice by nurses and physicians called upon to participate in or perform abortions will probably not pass constitutional muster under the E.R.A. The only alternatives open to nurses and physicians faced with a conflict between their religious beliefs and burdens imposed upon their employment by a hospital subject to the mandate of the E.R.A. will be either to terminate their employment, or to compromise their religious beliefs.

It should be considered by the Committee that the Equal Rights Amendment will be interpreted and enforced by federal judges who in a great number of cases have shown strong sympathy for the ideology of abortion. If it is the opinion of this committee that the amendment will have no impact upon legislation dealing with abortion, then it would be prudent to recommend an appropriate amendment to the E.R.A. to ensure courts will not misinterpret congressional intent. A failure to amend the E.R.A. to make it clear that it is the intent of Congress that it have no effect upon the ability of the state and federal governments' to deal with abortions must, in light of its legislative history, be considered an open invitation to the federal judiciary to use the E.R.A. to invalidate substantially all state and federal laws dealing with the subject.

The Right to Privacy

Proponents of the E.R.A. have alleged that the right to privacy would serve as a limitation upon the absolute mandate of "equal rights" contained in the clear language of the amendment. Professor Emerson, the leading advocate of this theory, has written:

> "Yet it is clear that one important part of the right to privacy is to be free from official coercion in sexual relations. This would have a bearing upon the operation of some aspects of the Equal Rights Amendment. Thus under current mores disrobing in front of the other sex is usually associated with sexual relationships. Hence the right of privacy would justify policy practices by which a search involving the removal of clothing could be performed only by a police officer of the same sex as the person searched. Similarly the right to privacy would permit the separation of the sexes in public restrooms, segregation by sex in sleeping quarters of prisons or similar

> public institutions, and appropriate segregation of living conditions in the armed forces."

Although the right to privacy has been recognized by the United States Supreme Court, Professor Emerson's application of this right to create a limit on the "equal rights" requirement of the E.R.A. is both logically and legally unsound.

The nature of a constitutional amendment is such that it changes all prior law. If a prior constitutional provision is in conflict with an amendment, the amendment controls. For example, the fifth amendment's requirements of "due process" and "just compensation" in the taking of private property did not lead to the payment of slave owners for their property taken when slavery was made unconstitutional by the thirteenth amendment. To the extent that the right to privacy is inconsistent with the E.R.A.'s demand for equal rights, the language of the amendment should control the outcome.

It must be observed the right to privacy and the E.R.A. are not greatly in conflict with one another. The only change in the right to privacy wrought by the E.R.A. will be a requirement that this constitutional right, as in the case of other rights, no longer be defined on a sexual basis. Just as the present right to privacy does not permit a woman to legally object to an otherwise proper body search carried out by a female police officer, after passage of the E.R.A. a woman will not be able to legally object to an otherwise proper body search carried out by a male police officer. Under the E.R.A. the sex of the officer would be as irrelevant to the legality of the search as the race of the officer would be under present law.

Even if one were to assume that the right to privacy would be interpreted by the Supreme Court as a limitation upon the otherwise absolute requirement of "equal rights" contained in clear language of the E.R.A., the exception envisioned by Professor Emerson is not consistent with the right to privacy developed in the court decisions creating the right. The right to privacy was developed as a bar to state intervention into areas of a person's life viewed as necessary for personal autonomy. It was not created to serve as a foundation for the extension of governmental power over the individual. As the right to privacy is a limitation upon, not a grant of power to, government, it could not be asserted by government to counteract the amendment's requirement that all sexual segragation be terminated.

The development of the right to privacy by the United States Supreme Court makes it clear that the right is one that belongs to the individual, not the state. As is the rule with any other constitutional right, an individual may give up, or in legal terms waive, the right. In the context of a military barracks, if some men and women choose to waive their right to privacy, the E.R.A. would mandate sexual integration. The same result would be reached in prisons if male and female prisoners choose to waive their right to privacy. It can be seen that the right to privacy, asserted by Professor Emerson as a limit upon the impact enactment of the E.R.A. will have upon society, cannot and will not operate in the manner he has asserted.

Conclusion

As a professor of law and a student of history I am well aware that distinctions based upon sex have long been part of the jurisprudence of all nations. Many of these distinctions are without logical foundation. Their demise would serve well the cause of civilization. Some distinctions, however, are both logical and necessary. Benefits bestowed by law upon pregnant women are an example of this type of distinction. Yet other distinctions, for example single sex showers in public schools, are founded upon moral values so strongly ingrained in American and western culture as to cause a majority of citizens to raise serious obejction to their being made unconstitutional. An important question to be considered is whether the E.R.A. as presently drafted would only prohibit legal distinctions based upon sex that have no logical foundation, or whether it would have a more far reaching effect. As it is my considered opinion that no one knows what effect the E.R.A.'s mandate of "equal rights" will have on many areas of national concern, a few of which I have touched upon in my testimony, I must oppose passage of the E.R.A. in its present form.

Testimony of Professor William A. Stanmeyer on the Impact of the ERA on the Military.

Mr. Chairman, distinguished members of the Committee: My name is William Stanmeyer. I thank you for the invitation to share my views with you on the impact the Equal Rights Amendment will have on our Armed Forces. It is a privilege to appear before you on this important topic.

I am a law professor who has taught jurisprudence and constitutional law at Georgetown University Law Center and later, for a number of years, at Indiana University School of Law. I have been widely published on constitutional law questions, including some that are pertinent here, such as the role of the Courts in governing the United States.

As a final introductory remark, I wish to express by deep respect for the impressive credentials of the other witnesses, with many of whom I must reluctantly disagree. As a former teacher of logic, I can only note, when their authority is invoked, that it is not extrinsic pedigree but intrinsic persuasiveness that ultimately should count in this debate. Moreover, it is a fact that the pro-ERA position was generally argued earlier and by groups more vocal than the anti-ERA people, and consequently that position sank into public sonsciousness, to the point that for some persons it is part of their psychology like an unreasoned prejudice, making it difficult for them to attend to the real fraility of the pro-ERA position when applied to such concrete concerns as the military draft and military combat. In other words, I am more impressed with the people than with their arguments; for most have not yet faced up to "the natural and probable consequences" of the political act they would have the nation perform.

The accuracy of this statement will appear from the analysis that follows, an analysis that is basically descriptive and not normative. That is, I am not arguing primarily that women should not be sent into combat but that simply as a predictive moral certainty, under ERA they will be sent into combat.

I. THE EQUAL RIGHTS AMENDMENT, IF NOT MODIFIED IN ITS OWN TEXT, WILL MANDATE THAT WOMEN BE REGISTERED FOR THE DRAFT.

It appears to me that this is a self-evident proposition. The ERA prohibits "discrimination" based on sex. That is, gender cannot be used as a basis or reason for treating men and women differently. It follows that if men are to be registered, so too are women to be registered. This was the thrust of the Rostker v. Goldberg case, which the Court of Appeals decided through the device of a sub-rosa reading of the Equal Rights Amendment into the Constitution. The United States Supreme Court reversed, and held that women do not have to be registered; but their reversal was due, at root, to the fact that at the time of the case the Equal Rights Amendment was simply not part of the Constitution. Once the ERA becomes part of the Constitution, the basis for the Supreme Court's reversal will be demolished.

This is the natural and logical interpretation of the Equal Rights Amendment in its "pure" or unmodified text. The Congress has the opportunity to make its mind clear on the point, even as the Congress had the opportunity over ten years ago, at the urging of Senator Sam Irvin, when it first considered the language of the first ERA. Senator Irvin offered a series of amendments or modifications to the formal constitutional Amendment text, to handle the more blatant abuses that an overly-logical federal or Supreme Court might be expected to create: e.g., mandating unisex public toilets, unisex schools, and a military that is composed 50% of women. It is instructive, I believe, to note that the proponents of the Equal Rights Amendment resisted any efforts to restrict its reach to such matters as the truly unfair cases of economic sexual discrimination (employment, pay, advancement) or other areas where a national consensus exists that women have been unfairly treated. Rather, the proponents of ERA insisted that it apply "across the board," to all situations where gender might be a factor in treating men and women differently. They rejected then, as they reject now, exempting our country's military from the logical reach of the Amendment. Some of them state candidly that they want ERA to apply to the military.

II. THE EQUAL RIGHTS AMENDMENT WILL MANDATE THAT WOMEN BE DRAFTED. THIS DRAFT WILL HAVE TO BE APPROXIMATELY 50% OF THE ARMED FORCES. IN A 4,000,000-PERSON ARMY, ROUGHLY 2,000,000 WILL BE FEMALE SOLDIERS.

The logic is irresistable: start from the premise that men and women must be treated "the same," and you cannot impose the burden of military service on more men and on fewer women. For that would not be treating them "the same."

There will be no principled way to draft, say, 80% men and only 20% women. There will be no principled way to limit assignments to certain military units to men only, or to a predominance of men. While there may be some military units whose special mission requires such extraordinary physical strength that only the most powerful of the male soldiers could even qualify, even in these cases the Amendment, at the hands of an aggressive litigator using sympathetic Federal Courts, will be understood to require that the Army test--and perhaps offer extended special training to--any women who desire to enter such units or who may appear marginally capable. But as for "boot camp" in general and the ordinary make-up of standard military units, there will be no way to exclude women or to limit their involvement to a disproportionately small number.

Therefore the ERA will create the first Army in the history of the world in which women compose a substantial proportion of its soldiers. Even Hitler, at the end of World WAR II, desperate for infantrymen, inducted 14-year-old boys but did not induct 24-year-old women. Because of an Amendment in our Constitution, written in peace time and ratified (if it is) because of domestic discriminations such as unequal pay for equal work, we will create an Army and a Navy composed of persons who in overwhelmingly large part would never volunteer to serve, or, if they had volunteered, would not qualify if adequate manpower were available. Faced with a Soviet army in which the average Russian soldier weighs perhaps 170 pounds, the United States will field an army in which half of the America soldiers weigh perhaps 130 pounds.

III. THE EQUAL RIGHTS AMENDMENT WILL REQUIRE THAT ONE-HALF THE ELIGIBLE MARRIED WOMEN BE DRAFTED, WHILE THEIR HUSBANDS STAY HOME, AND IN MANY CASES TAKE CARE OF THE BABY.

At the hearings for the first Equal Rights Amendment over ten years ago, a number of law professors who supported the unqualified text addressed the point of deferments. They had the honesty not to flinch from the ruthless logic that they wanted to unleash. They acknowledged, correctly I believe, that if you draft "equally" you must defer "equally": viz., you could not single out women, even if married, even if married with a child, for deferment when you could "equally" defer their husbands in 50% of the cases. In seeking to circumvent this fact--which to most men in the United States would create an outrageous situation--they suggested that perhaps Congress could authorize, in such cases where both husband and wife were qualified by age and physique, the persons themselves to decide which one of them would go into the Army. That is, possibly, they suggested, Congress could leave it up to each couple to decide whether he would go to war or he would stay home with the baby while she went to war.

With all due respect, this is an absurd suggestion. It would create a hopeless administrative tangle. The flexibility of the Services in assigning draftees would be complicated far beyond any human mind's capacity to bring sense and order. But it is likely that in 80 to 90% of of the young families given this bizarre choice, the men would opt to enter the military rather than have their wives, who usually are not as strong or aggressive, go to Fort Leonard Wood and later to face an all-male enemy somewhere in a foxhole 10,000 miles from home. But it is not unlikely that those ideological litigators using, once again, the sympathetic Federal Courts, will find some Judge to declare that this "gender-based option" in the draft law is unconstitutional because its plain intent is to allow individuals to "discriminate" in the face of the national policy against all "discrimination" on the basis of sex.

I do not believe one male Congressman in our Congress would decide to stay home while his wife went to boot camp. I do not believe one Congressman or Congresswoman would dare, as a matter of political future and career, to vote for a draft law that required half the deferments-for-parenthood to go to men and required that the mother go to war while the father stayed home with the baby. For the voters would expel him or her from Congress at the next election. Yet to approve the ERA without making it clear that Congress does not want women drafted, and wants women deferred where deferments are provided, is to create a situation where a Court can decide that Congress wants the opposite.

We should not "pass the buck" to the Courts on a matter of such cosmic importance. This question affects in a radical and profound way both (a) the overall combat readiness and physical stamina of our entire Army; and (b) the domestic lives of virtually every family in the country. For unlike the other controversial social decisions of the Federal and Supreme Courts, drafting women and deferring some men while their spouses go to boot camp will affect practically every wife, mother, and daughter in the country. When the Supreme Court legalized abortion, it did not require that your wife have an abortion. When the Supreme Court legalized all pornography except "hard-core," it did not require that your daughter play in a pornographic movie. When the Supreme Court approved court-ordered bussing to achieve racial balance, it did not simultaneously outlaw private schools or moving one's residence, so that parents of 4th-graders could not avoid having their nine-year-olds spend a quarter of their waking day travelling across big cities during rush hour. But here the Court can impose a positive obligation: it can make people do something they don't want to do--or many of them will not want to do. And not just for a single act, for a few moments, or for part of some days in a week. Rather, the Court can impose on every woman in the country between the ages of 18 and 26 the obligation to spend two or three years as a soldier. And if, for the sake of logic and mathematical exactness, it requires random-chance deferments for 50% of the married men and 50% of the married women who are otherwise qualified, it can impose on even half the mothers of young children the obligation to leave those children for two or more years and force the civilian husband to care full-time for the child while the mother attends boot camp, then ships out, and then spends those years perhaps in Asia, or Latin America, Europe, or the Middle East, in the company of hundreds of men who, if they are normal, will not be famous for their own sexual restraint, and in situations often fraught with danger from determined adversaries.

IV. THE EQUAL RIGHTS AMENDMENT WILL REQUIRE THAT WOMEN GO INTO COMBAT IN VIRTUALLY, IF NOT EXACTLY, THE SAME PERCENTAGE THAT MEN GO INTO COMBAT: 50-50.

Knowing how the Supreme Court has handled mathematical deviations in the Reapportionment Cases, the prognosticator is not optimistic about some future Court's handling of statistical imperfections in the make-up of the unisex Army that ERA will create. The Court can scarcely tolerate a deviation, between, say, two Congressional districts, of 47-53%, even if because of georgraphy there is a rationale for the difference. There is no doubt that the Army will not be able to justify keeping out of combat those 2,000,000 women they will draft. For one thing, granted the investment in processing and training (and therefore in not processing and training men, to this extent) there will be demographic pressures in the Service for using them; besides which, the Courts are almost sure to say that the Joint Chiefs will make a mockery of the Equal Rights Amendment if they go through the motions of admitting women "without discrimination" and then degut the national policy by keeping them out of the very activity--combat--to which all their being drafted and being trained was directed in the first place.

Now if Congress wants to send our Nation's wives, daughters, sisters, and mothers into combat against the Russian army, or against terrorist commandos in some future theater of war such as the Middle East, let it say so openly. If Congress believes that to send these women into combat is to send a better Army than the ones we fielded in World War I, in World War II, in Korea, and in Viet Nam, let it say so. If Congress thinks that to send an army half composed of women will strike greater fear into the enemy's hearts than to send an all-male army, let it say so.

Now at this point, some of my hearers may think the last remark was chauvinist. They will say, "A woman can do anything a man can do." Of course, in a sense they are right--a woman can do"anything" a man can do. But we are not talking about a woman, the occasional Wonder Woman, the super athlete who spends hours in the gym weightlifting. We are talking about a random selection drawn from the entire general population, which includes largely millions of women who are not inclined to play Wonder Woman or to lift weights. And we are talking about a life-and-death activity that is not just desk-bound computer programming or reading a radar screen, an activity in which often the key to survival is steroids and hormones, adrenalin and aggressiveness, and at bottom raw stamina and strength.

Any person who says that women as a class can do the same things that men as a class can do or that men as a class can do the same things women as a class can do is a person so divorced from reality that one may question his good sense or good faith.

In this connection I would like to call the Committee's attention to the Appended statistics on comparative competitive swimming times, contrasting the speeds of men and women. On his own initiative, a party in Florida, who had two sons and two daughters in AAU speed swimming for over ten years, sent these figures to me. His point was to suggest what a disaster ERA, if applied with ruthless logic to public-school swim teams, would cause for women's swimming: men average 10% to 13.8% faster than women in all events and almost all age groups, so that if the constitution mandated "unisex" swimming teams instead of the present arrangement of separate men's and women's teams, many of the "second-string" young men would replace many otherwise "first-string" young women, and the sum total of women swimming would be substantially reduced. In the name of "equality," women would have *fewer* chances to compete!

As a parent who also has two boys and two girls in competitive speed swimming, this prospect is disturbing if not outrageous. But the lesson for us, in considering the effect of ERA on the military, is far broader.

The lesson is that no amount of training will make men and women "equal" *as a group* where a main factor in performance is raw physical strength. And swimming is a perfect case in point: as my correspondent points out,

> in swimming, both girls and boys customarily start competition at the same age (about 8); practice the same distance daily; have identical devotion to competition; and try out in equal numbers. Even psychologically, women are not handicapped; they remain graceful ... no edge for the 'macho' male counterpart. Strength is not even the total factor; stroke technique, starts, turns, etc. are vital too.

This discussion of swimming is central to the issue of military training: for it is sometimes argued that "women can do anything men can do if you give them enough training," and to overcome the initial relative lack of strength among the female recruits all the Army need do is give the women more training. The argument sounds good in a hearing room; it will not work in the field. If after *10 years* of competitive training under the *exact same* conditions as male swimmers the female swimmers are, as a class, still about 12% less powerful than the men as a class, can anybody seriously concend that after 10 *weeks* of "boot camp" the *average* female recruit will be "equal" to the male recruits?

I sometimes wonder whether the proponents of a unisex army have the[illegible] ever been deeply involved with the physical training of te[illegible] The long training of female swimmers is far more personalized and, over the years, far more focussed on both endurance and precise skills/techniques than, in the nature of things, the brief training of the neophyte infantryman. Moreover, because literally thousands if not millions of young women are involved in swimming in our country, it provides a perfect laboratory for comparison, unlike the Super Woman weight-lifter in the muscle magazines, whose unique heredity, opportunity, persistence, and coaching develop her--after many years--into a powerful specimen stronger than very many men and stronger than all other women. But the Army does not have many years to train its random recruits.

Thus it follows with absolute certainty that if ERA applies to the armed forces, those forces will--as a group, whatever the unique skills of some individual super-specimens--be less physically strong than past armies which the United States has fielded--and less physically strong, when comparing aggregates, than the Russian army.

V. CONGRESS CAN PREVENT COURT-ORDERED UNISEX MILITARY ONLY BY ADDING AN EXPLICIT RESTRICTION TO THE ERA, PREVENTING IT FROM APPLYING A CROSS-THE-BOARD TO THE MILITARY.

There are a number of possible reactions to my comments up to this point. The first is: "We do want a unisex military because we want absolute 'equality' between men and women in all things." If that is the position of any person reading or hearing my words, my response is: (a) I disagree with you because such a change would harm our armed forces, for reasons already stated; but (b) you should publically state this fact so that the American people can judge whether they want a person who desires such a policy to represent them in our national government, and whether they want to ratify an Amendment that would accomplish such radical change in the lives of the nation's women. Do not remain silent. Do not say, "We will leave it up to the Courts." That is a cop-out. Speak out boldly: if you want a military that is one-half female, if you want women in combat, have the courage to say so openly.

The second reaction is to say: "We do not know whether ERA will mandate a unisex military." My response is: if we really do not know, and still plan to submit ERA to the States, we are giving the Courts a "blank check" of enormous proportions. Under our Constitution, the Congress has the responsibility for creating our Army and Navy; not the Federal Courts. To delegate to the Courts, under the guise of real or pretended ignorance, is to abdicate Congressional responsibility. It is absolutely irresponsible to change the nation's basic law through a formula so open-ended that no one knows what it will do. Will a Congressman go before his constituents and say, "I do not know whether ERA will mandate drafting your wives and daughters or not, but I voted for it anyway?"

The third reaction is to say, "You are wrong, ERA will not mandate drafting women and ultimately sending them into combat." My response is: if I am indeed wrong, then let us write down exactly that limitation. Often in drafting contracts for parties who seem to be in fundamental agreement, the lawyer hears one of the parties say, "We're agreed on that point, so there's no point in writing it down." My answer is just the opposite; I always say:

> "If we are agreed, then there is no problem in spelling it out--because your own memories may forget otherwise, and you heirs and assigns will need reassurance years later as to our exact understanding."

There is no point in vagueness. Lack of clarity breeds lawsuits.

Similarly, with ERA, what is the value of vagueness? If we really want our heirs and assigns to know exactly what we meant when we submitted ERA to the States for ratification--and if we mean ERA not to apply to the Armed Forces--why not write it down? It would be a simple task to add a Clause: "This Amendment shall not apply to the Nation's Armed Forces." Congress would still have the power, as it has now, by legislation to draft women and to send them into combat--if the American people wanted to do so.

Moreover, if it is said that ERA is meant to deal with domestic discrimination and that its sponsors and supporters do not want it to apply to the military, then let them come up with a text that admits of only this interpretation, and let them support--rather than oppose--modifications to the Amendment when offered by such persons as Senator Irvin.

But the sponsors will have to do more than change a vague text. They will need to change their rhetoric, and probably change their ideology. For the "women's liberation movement," which Congress desires to placate, seems to insist on the "across-the-board" equality I have described, that ruthless logical equality that would not only require more money to be spent on women's sports in school (an idea I support) but also require that men and women be randomly mixed in any governmental enterprise, including prisons, and of course in the military.

Possibly if we started the ERA process without the benefit of the last 20 years of history, it could be plausibly argued that the Amendment, despite its ambiguity, applies only to the civilian sector and not to the military. Possibly if the proponents were less absolutist in their ideology and their rhetoric, it could be argued that "common sense" should provide what Justice Frankfurter was wont to call "the gloss" in helping us interpret uncertain words. But antiseptic isolation from the history of the recent feminist movement is impossible. Disassociation from the rhetoric and even the personalities of the leading feminist activists is impossible. Disregarding the "legislative history" of the prior Amendment, a history which included the rejection of Senator Irvin's attempt to restrict the Amendment to the contexts where common sense would have it apply, is also impossible. Denial of the problem of vagueness in the present text is impossible. And blindness to the fact that Congress itself refused to register women for the Draft but a Federal Court of Appeals tried to force Congress to do so is equally impossible.

There is only one way to make sure that the Equal Rights Amendment you are considering will not mandate a military that drafts 2,000,000 women into a 4,000,000-person army and in turn sends many of those women into combat. That way is a short Clause stating that the Amendment shall not apply to the Nation's Armed forces.

Thank you for your courtesy and your attention.

Respectfully submitted,

William A. Stanmeyer
William A. Stanmeyer, Esq.

Men (15 years of age and older) as a group, are superior in speed. Below, I show the details... but in short, women require an average of 11% more time to swim the same distance. This is in spite of the fact that: in swimming, both girls and boys customarily start competition at the same age (about 8); practice the same distance daily; have identical devotion to competition; and try out in equal numbers. Even psychologically, women are not handicapped; they remain graceful, lady-like "Ester Williams's"...no edge for the "macho" male counterpart. Strength is not even the total factor; stroke technique, starts, turns, etc. are vital too.

Women train so well in fact, they cut the differential from an overall average of 11% to 9% on the more grueling, longer events...see below, 500 freestyle. But when you open the age to 25 and restrict the times to the very best in the nation...the women go from 12% slower to 13.8% slower (see both 100 freestyle entries, below).

Excerps from the current 1978 Florida Age Group Times for short course (25 yard pools):

STANDARD	AGE GROUP	STROKE	YARDS	BOYS	GIRLS	DIFFERENCE
AAAA	15-18	Freestyle	50	22.7 sec.	25.8 sec.	13 2/3 %
AAAA	15-18	Freestyle	100	48.9 sec.	54.8 sec.	12 %
AAAA	15-18	Freestyle	500	4:44.2 sec.	5:10.4 sec.	9 %
AAAA	15-18	Butterfly	100	53.3 sec.	59.6 sec.	11.8 %
AAAA	15-18	Individual Medley	200	2:00.8 sec.	2:12.7 sec.	9.85 %
Senior Nationals	Senior (to age 25)	Freestyle	100	46.3 sec.	52.7 sec.	13.8 %

II. Correspondence

American Farm Bureau Federation

WASHINGTON OFFICE
600 MARYLAND AVE., S.W.
SUITE 800
WASHINGTON, D.C. 20024
AREA CODE 202 - 484-2222

May 20, 1983

Honorable Orrin Hatch, Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Farm Bureau would like to submit the following comments on S. J. Res. 10, the Equal Rights Amendment.

The American Farm Bureau Federation is the nation's largest general farm organization with a membership of over 3 million families in 48 states and Puerto Rico. Policies of the American Farm Bureau Federation are determined annually after being studied, debated, and approved by a majority vote of its members, at county, state, and national Farm Bureau meetings. The issue before this Subcommittee is of great concern to Farm Bureau members, as expressed by current Farm Bureau policy.

At the 1983 annual meeting of the American Farm Bureau Federation, the voting delegates of member State Farm Bureaus adopted the following policy:

"We oppose equal rights amendment legislation."

Farm Bureau appreciates the opportunity to present its views and asks that this statement be made a part of the hearing record.

Sincerely,

John Datt

John C. Datt
Secretary and
Director, Washington Office

cc: Members of the Subcommittee

AMERICAN BAR ASSOCIATION

GOVERNMENTAL
AFFAIRS GROUP

DIRECTOR
Robert D. Evans

STAFF DIRECTOR FOR
GOVERNMENTAL LIAISON
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EDITOR,
WASHINGTON LETTER
Dean R. Owen

1800 M STREET, N.W., WASHINGTON, DC 20036-5886 TELEPHONE: (202) 331-2200
WRITER'S DIRECT NUMBER: 331-2214

July 1, 1983

Honorable Orrin G. Hatch
Chairman, Subcommittee on
the Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

It is our understanding that your Subcommittee held one day of hearings to air the arguments for and against the Equal Rights Amendment, and that additional days may be scheduled in the upcoming months. The American Bar Association emphatically affirms its commitment to equality of rights under the law and reiterates its long-standing support for passage and ratification of the Equal Rights Amendment as embodied in S.J. Res. 10. We request that you include this letter in the hearing record.

The American Bar Association first pledged its support for the Equal Rights Amendment in 1974. Since that time, passage and ratification of the ERA has become a presidential priority within the ABA. We firmly believe that the Equal Rights Amendment is the only way to guarantee men and women permanent equality of rights under the law and would like this opportunity to highlight briefly two major reasons for this.

We reject the argument that inequities have been and will continue to be addressed adequately through enactment of individual statutes. Statutory reform of our laws does not provide permanent protection against sex discrimination. Even the many rights won by women over the past decade are not secure without the ERA because these laws can be repealed by legislators at any time, and regulations implementing these laws can weaken their force and effect. No ordinary statute can provide the bedrock protection of a constitutional amendment. The ERA, once part of the Constitution, will assure that equality under the law is a basic, inalienable right, beyond the reach of politics and changing policy.

Some opponents also argue that the ERA is unnecessary because the United States Constitution already protects women's rights. It clearly prohibits discrimination by government on account of race, religion, and national origin, but does not clearly prohibit discrimination on account of sex. Neither the Fifth nor the Fourteenth Amendment's Equal Protection Clause provides men and women with the guarantee of equality they seek. The Supreme Court consistently has declared race discrimination impermissible under the Equal Protection Clause, but time and again, it has refused to view classification based on sex as inherently suspect. Instead, the Court has been inconsistent and unclear as to what standard of review is constitutionally mandated in sex discrimination cases. Only an amendment to the Constitution will give a clear constitutional basis for overturning any law which fails to give equal treatment to men and women.

Soon we will be celebrating the 200th anniversary of our Constitution. Over the years, its democratic principles have been extended through the amendment process to create equality for those of every race, national origin and religion, and to guarantee women the right to vote. We ardently hope that we will start our third century by extending full democratic equality to women through passage and ratification of the Equal Rights Amendment.

Sincerely,

Robert D. Evans

Robert D. Evans

RDE:sss

cc: Members of the Subcommittee

Resolutions Adopted in the 42nd Annual Convention of

THE NATIONAL ASSOCIATION OF EVANGELICALS

Columbus, Ohio - March 6-8, 1984

EQUAL RIGHTS AMENDMENT

In a 1979 resolution, the National Association of Evangelicals affirmed: "God created mankind in His image, assuring the sacredness of human life and the equality of persons, male or female." In recent years the Equal Rights Amendment has been promoted as a way to assure the equal rights of women as persons. Proponents of the ERA are now contending that the amendment presents only an economic issue. But the absolute and far reaching language of the ERA makes its effects unpredictable, and certainly more diverse than claimed. It could be interpreted by the courts to reach results antithetical to Judeo-Christian values.

Because of this possibility, NAE cannot endorse the Equal Rights Amendment in its present form. At a minimum, it would have to state that it is not intended to grant or secure the right to abortion or the funding thereof; to require the drafting of women or their assignment to military combat; or to deny tax exemption to any school, seminary, or church which believes that God has ordained different roles for men and women.

NAE has supported and will continue to support legislation specifically designed to remedy economic injustices to women.

RNEW
THE RELIGIOUS NETWORK FOR EQUALITY FOR WOMEN

National Office: 475 Riverside Drive, Room 830A, New York, NY 10115 (212) 870-2995

Judith Hertz
National Chairperson
The Rev. Dolores J. Moss
National Coordinator
NATIONAL BOARD:
American Baptist Women
American Baptist Churches in the U.S.A.
National Ministries
Christian Church (Disciples of Christ)
Division of Homeland Ministries
Christian Methodist Episcopal Church
The Missionary Council
Church of the Brethren
Church Women United in the U.S.A.
The Episcopal Church
Task Force on Women
Evangelical Women's Caucus
Friends Committee on National Legislation
Leadership Conference of Women Religious
Lutheran Church in America
Division for Mission in North America
Mormons for ERA
National Assembly of Religious Women
National Coalition of American Nuns
National Council of Churches
Commission on Regional and Local Ecumenism
National Council of Churches
Division of Church and Society
National Council of Jewish Women
National Federation of Temple Sisterhoods
NETWORK
Presbyterian Church in the U.S.
Committee on Women's Concerns
Presbyterian Church in the U.S.
General Assembly Mission Board
Sisters of Loretto
Sisters of the Humility of Mary
Union of American Hebrew Congregations
Unitarian-Universalist Association
Section on Social Responsibility
Unitarian-Universalist Women's Federation
United Church of Christ
Coordinating Center for Women
United Church of Christ
Office of Church and Society
United Church of Christ
United Church Board for Homeland Ministries
The United Methodist Church
Board of Church and Society
The United Methodist Church
Women's Division — Board of Global Ministries
The United Presbyterian Church in the U.S.A.
Council on Women and the Church
The United Presbyterian Church in the U.S.A.
Third World Women's Coordinating Committee
The United Presbyterian Church in the U.S.A.
United Presbyterian Women
United Synagogue of America
Joint Committee on Social Action
Women's League for Conservative Judaism
Young Women's Christian Association of the U.S.A.
National Board
ASSOCIATE MEMBERS:
Institute of Women Today
Intercommunity Center for Justice and Peace

7/21/83

The Honorable Orrin Hatch, Chairman
Subcommittee on the Constitution
Russel State Office Building, Room 125
Washinton, D.C. 20515

Dear Senator Hatch

Just a few lines to tell you the the Religious Network for Equality for Women (formerly Religious Committee for the ERA) is alive and well. Since our reorganization in July, 1983 RNEW has been working to create strategies, programs and resources which will mobilize and strengthen religious support for economic and legal justice for women. RNEW members assert that our religious faith mandates this work.

Under the direction of the Legislative Taskforce Chairwoman, Joyce V. Hamlin (United Methodist Church Women's Division General Board of Global Ministries) RNEW has developed four legislative objectives. They are:

Objective #1 Social Security

The RNEW Board affirms a commitment to systemic change in the Social Security system and urges its members to take an affirmative stand on the concept of "earnings sharing" for benefit purposes in Social Security to assure that each spouse will have Social Security protection in her/his own right.

Objective #2 Equal Rights Amendment

The RNEW Board affirms a commitment to the adoption of a federal Equal Rights Amendment.

Objective #3 Jobs for Women

The RNEW Board will participate with other groups to see that each jobs bills presented to Congress assures that women get their fair share of such jobs.

Objective #4 Electoral Politics

The RNEW Board focus on educating women for greater participation for electoral politics.

Our most recent publication, which is enclosed is a principal educational tool for work in the religious community on these issues.

RNEW is planning several regional education consultations on the outlined issues.

We hope you will keep us in mind as you work on these issues. We are available for consultation.

Sincerely,

Judith M. Hertz

Judith M. Hertz, Chair RNEW

JMH/jm

An interfaith coalition of Catholic, Jewish and Protestant groups whose purpose is to work for justice for women, especially the elimination of poverty and legal inequities.

UNITARIAN UNIVERSALIST ASSOCIATION OF CHURCHES
IN NORTH AMERICA

THE FOLLOWING RESOLUTION WAS PASSED AT THE 22ND ANNUAL GENERAL ASSEMBLY
HELD IN JUNE, 1983, IN VANCOUVER, BRITISH COLUMBIA

EQUAL RIGHTS AMENDMENT

WHEREAS, in the United States women are still deprived of equal Constitutional rights, equal salaries, equal access to positions of responsibility and equal treatment in terms of health care, insurance and Social Security; and

WHEREAS, men would also benefit from equality of rights under the law, and

WHEREAS, the Equal Rights Amendment has been submitted to the United States Congress this year (1983) as it has been every session since 1923 (with the exception of the years during which it was being ratified by the states);

BE IT RESOLVED: That the 1983 General Assembly of the Unitarian Universalist Association urges that the 98th Congress of the United States act immediately to pass and submit to the states for ratification the Equal Rights Amendment which states:

> "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

and further that the U.S. Unitarian Universalist societies work for ratification within their states.

THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC.
2012 Massachusetts Avenue, N.W., Washington, D.C. 20036

NATIONAL CONVENTION

Columbus, Ohio

July 24 - 28, 1983

RESOLUTION: ERA

WHEREAS, The Equal Rights Amendment is before the Congress of the United States of America; and

WHEREAS, The Courts have construed the Constitution so that women are not equal under the law; and

WHEREAS, Acts of Congress can be repealed by successive Congresses and therefore do not give permanent equality of rights to women; therefore, be it

RESOLVED, That The National Federation of Business and Professional Women's Clubs, Inc., of the United States of America, representing more than 150,000 working women and men, in convention assembled in Columbus, Ohio the 27th day of July, 1983, urge immediate, positive action on the Equal Rights Amendment (House Joint Resolution 1 and Senate Joint Resolution 10) to the U.S. Constitution.

Equal Rights Amendment

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any other State on account of sex.

Section 2. The Congress shall have the power to enforce by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

AMERICAN COLLEGE
PERSONNEL ASSOCIATION

acpa

A Division of the American Personnel
& Guidance Association

May 12, 1983

The Honorable Orrin G. Hatch
Judiciary Committee
Chair, Subcommittee on the
  Constitution
U.S. Senate
Washington, D.C.   20515

Dear Senator Hatch:

I am writing for the American College Personnel Association (ACPA), a national organization representing 7,000 members in higher education, to express strong support for HR 1, the Equal Rights Amendment. Current legislation does not insure equal protection. It is our continued conviction that the best way to assure equality is through the Equal Rights Amendment. Without it work for equality is condemned to piece by piece, item by item attention and change. To attain equal protection without the ERA thousands of separate individuals will have to take immeasurable time, expense and make personal sacrifices to litigate against discriminatory laws and practices. Without the ERA one's equal opportunity and protection will depend upon which state or county one lives in and upon the individual and often inconsistent interpretation of local authorities. If women are to achieve equal rights under the law in this country, the passage of this bill and the ratification of the Equal Rights Amendment is crucial.

The Executive Council of ACPA and I urge your support of this bill.

Sincerely,

Margaret J Barr

Margaret J. Barr
President (1983-84)

MJB/dp

cc: Dr. Jack Beyerl, Government Relations Chair, ACPA
    Dr. Ed Herr, President, APGA
    Ms. Kathleen Maxfield, Standing Committee for Women, ACPA

Two Skyline Place, Suite 400 • 5203 Leesburg Pike • Falls Church, VA 22041

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Otto K. Finkbeiner, Associate Stated Clerk and Treasurer
Robert T. Newbold, Jr., Associate Stated Clerk
Robert F. Stevenson, Associate Stated Clerk
Mildred L. Wager, Assistant Stated Clerk

July 30, 1984

The Honorable Orrin G. Hatch
Chairman
Senate Subcommittee on Constitutional Amendments
United States Senate
Washington, D. C. 20510

Dear Senator Hatch:

The 196th General Assembly of the Presbyterian Church (U.S.A.) meeting in Phoenix, Arizona, from May 29 - June 6, 1984, adopted a resolution advocating the passage of the Equal Rights Amendment by the Congress of the United States and ratification by the states.

The General Assembly, the highest governing body of the Presbyterian Church, is composed of nearly 700 voting delegates elected to represent churches with more than 3,100,000 members. The General Assembly establishes policy and direction for the whole denomination in its internal life and its witness to the world. Its judgments on public issues govern the programs of denominational agencies and provide guidance for other parts of the church, though they do not claim to express the opinion or bind the conscience of individual Presbyterians.

The Presbyterian Church has consistently supported the passage of the Equal Rights Amendment. The General Assemblies have advocated on an almost yearly basis from 1970 to 1982 the passage of such an amendment.

The Presbyterian Church bases its support for the Equal Rights Amendment on its theological conviction that "God has called women and men in all times and places to work for justice for all people," and its belief that the principle of equality inherent in the Constitution needs to be made explicit in the passage of this Amendment.

Thank you for your attention to this action of the General Assembly of the Presbyterian Church (U.S.A.). A copy of the resolution in its entirety is appended.

Sincerely,

James E. Andrews

James E. Andrews

Attachment
JEA/esa

RESOLUTION ON THE
EQUAL RIGHTS AMENDMENT
TO THE UNITED STATES CONSTITUTION

Approved by the 196th General Assembly (1984)
Presbyterian Church (U.S.A.)
June, 1984

Whereas God has called women and men in all times and places to work for justice for all people, through the prophets and the ministry of Jesus Christ, and God continues to call us to work for justice everywhere; and

Whereas the Equal Rights Amendment to the United States Constitution represents a principle of equality for all people, a principle consistent with the justice that God requires and to which all Christians are committed; and

Whereas General Assemblies of the antecedent churches of the Presbyterian Church (U.S.A.) advocated passage of the Equal Rights Amendment almost yearly from 1970 to 1982;

Therefore, the 196th General Assembly (1984) of the Presbyterian Church (U.S.A.):

1. Advocates passage of the Equal Rights Amendment by the Congress of the United States and ratification by the states.

2. Resolves that the principle of equality inherent in the Constitution and explicit in the Equal Rights Amendment should not be diluted by any amendments on any issue.

3. Directs the Stated Clerk of the Presbyterian Church (U.S.A.) to communicate this action to the Senate Subcommittee on Constitutional Amendments and the House Judiciary Committee, by formal communications and in hearings that may be scheduled, and to the President of the United States.

4. Urges synods, presbyteries, and all church members to communicate support for the Equal Rights Amendment to federal and state government representatives and to work for ratification of this amendment.

5. Requests the appropriate General Assembly agencies, particularly the Program Agency, General Assembly Mission Board, Council on Women and the Church, and the Committee on Women's Concerns, to develop ongoing educational and program materials on the Equal Rights Amendment for use in congregations and governing bodies.

NATIONAL COUNCIL OF CATHOLIC WOMEN

NOVEMBER 5, 1972

1. The Equal Rights Amendment would not affect major, basic discriminations rooted in custom and prejudice. Employers would not be compelled to hire women.

2. The Amendment would destroy all the protective legislation achieved over the course of years. State wage and hours laws would be over-ridden, encouraging the return of the sweatshop. Essential health legislation would be destroyed. The need to protect women remains. Mass production methods cause strain. There is still the temptation to exploit young inexperienced women. It will be a long time before State legislatures will extend to men the same protection now given women. The elimination of special labor laws would in reality destroy the equality achieved for men and women.

3. Social Security legislation would be endangered. Congress and the State legislatures would have to wipe out special benefits for wives and widows or else provide similar benefits for husband and widowers. This would "unbalance" the Social Security system.

4. The Amendment would destroy the safeguards society has erected around the wife and mother as the center of the family. Equality in family headship would tend to disintegrate the family. The courts would be forced to place the same responsibilities for support of the family on mothers with young children as on the father. If the family is to be preserved, the right of the married woman to support by her husband must be retained.

5. There are real differences, both physical and social, between men and women. Nature cannot be amended. The legal position of women cannot be stated in a single formula as their relationships are so varied. Absolute legal equality is impossible. Where there are real physical or social differences, identity of treatment is itself a form of discrimination. Identical treatment also deprives the State of the right to protect itself by safeguarding women as potential mothers of future generations.

6. The Amendment is not needed. Legal discriminations in State laws and constitutions will be changed as fast as enough women in those States want them changed. The vote gives them that power. In any case, the Amendment would not be self-executing, each State would have to change its laws one by one. It would be a tremendous task even to determine exactly which laws needed to be changed or repealed.

7. Federal legislation cannot reach intrastate service industries. State protective legislation has opened the way for improved conditions for all workers. The proposed Amendment threatens the standards of all working people and the labor movement as a whole.

8. Adoption of the Amendment would cause a period of great confusion in constitutional law. Innumerable changes in State laws would be required. Courts would be overburdened trying to work out definitions of "rights" and "duties." The Amendment is a device to save us from thinking by dumping the burden on the courts. It is undemocratic to take from the legislatures and give to the courts the power to decide questions of social policy.

9. Because the Amendment would provide women with equal rights to hold civil and political offices, it is special legislation, in the legal sense of that expression, and therefore has no place in the Constitution. It would add practically nothing to the equal rights clause of the 14th Amendment, anyway.

10. The Amendment would attempt to achieve a uniform status for women in all 50 States, whereas diversity may be not only unavoidable but also desirable. The terms of the Amendment are vague and do not indicate whether equality is to be achieved by lowering the privileges now accorded to men or by raising the privileges of women.

Christian Legal Society

Minnesota Chapter
520 Norwest Midland Building
401 Second Ave. So.
Minneapolis, MN 55401
(612) 339-5036

July 27, 1983

Senator Orrin Hatch
135 Russell Senate Office Bldg.
Washington, D.C. 20510

Re: Proposed Equal Rights Amendment

Dear Senator Hatch:

I know that you are opposed to adoption of the ERA as an amendment to the U.S. Constitution and have recently chaired some hearings on the issue.

Enclosed is a summary of a case in the May, 1983 issue of the Religious Freedom Repoeter published by the national Christian Legal Society. The case to which I call your attention is Madyun v. Franzen (7th Cir. April 5, 1983). The court held that the equal employment opportunity for women as prison guards was a more important factor than the religious claims of a Muslim prisoner. It seems to me that if the ERA was adopted as an amendment to the constitution, unjust rulings of this type would be frozen into place.

As an additional point of information I do recall that one of the issues for the womens movement of the 19th century in our nation was to obtain women matrons in prisons which confined women because during the 19th century apparently there were only men prison guards even in womens prisons. One of the organizations which opposed this practice was the Womens Christian Temperance Union(WCTU) and I understand that they, along with others, were ultimately successful in obtaining women as prison guards in womens prisons. Now the situation is reversed- a court has mandated women guards in mens prisons.

Very truly yours,

Thomas Strahan

Thomas W. Strahan
Christian Legal Society of Minnesota

national
RIGHT TO LIFE
committee, inc.

Suite 402 419 7th Street, N.W.
Washington D.C. 20004 — (202) 638-4396

RESOLUTION

EQUAL RIGHTS AMENDMENT

January 21, 1983

WHEREAS, the first and most fundamental right of every person is his or her right to life, this is the prerequisite of all other rights, and therefore must be protected above all other rights;

WHEREAS, even though the Equal Rights Amendment to the Constitution appears to promote equality under the Law, it would almost certainly write into the Constitution the mother's alleged right to kill her preborn child and thereby further promote a far more insidious form of discrimination - that which would deny the right to life on the basis of age and condition of dependency;

WHEREAS, the minority group most discriminated against in America today consists of those preborn children who are denied their equal right to live because of the monstrous evil of legalized abortion, and

WHEREAS, one of the primary goals of the right to life movement is to restore the legal right to live for preborn Americans and prohibit abortion through enactment of a Human Life Amendment,

THEREFORE BE IT RESOLVED that the National Right to Life Committee shall oppose the passage of the Equal Rights Amendment to the U.S. Constitution until such time as a provision is added to insure that the ERA does not secure, expand or endorse any right to abortion or the funding thereof.

This resolution was passed by the Board of Directors of the National Right to Life Committee, unanimously, at the January Board meeting, convened in Washington, D.C.

III. Reports

SUPPLEMENTARY DOCUMENT # 1

REPORT OF
ARCHBISHOP JOHN L. MAY, CHAIRMAN
AD HOC INTERDISCIPLINARY COMMITTEE
ON THE
EQUAL RIGHTS AMENDMENT

GENERAL MEETING
NOVEMBER 12-14, 1984
WASHINGTON, D. C.

My responsibility today is to render a report of the work, deliberations and conclusions of the Ad Hoc Committee on the Equal Rights Amendment, of which I am Chairman. However, before I do so, I believe it is important to review, if only briefly, the course our Conference has followed over the years preceding the establishment of this Committee last March.

The Equal Rights Amendment, popularly known as ERA, was first approved by the Congress in 1972. It provided then, as it does now: "Equality of rights under the law shall not be abridged by the United States or by any State on account of sex." To most Americans, this provision seems an uncomplicated and straightforward statement of a fundamental principle of simple justice. It is not until its terms are understood in the light of penetrating legal analysis that its complexity is revealed. And thus, early in the public debate, concern mounted that the interplay of ERA with other principles of law could yield troublesome collateral effects.

Our Conference fully supports ERA's basic goal of justice between the sexes. However, we have also been alert to the possibility of countervailing implications. Thus, in 1972 the Ad Hoc Committee on Women in Society and the Church issued a report after considerable consultation, including consideration of papers prepared by the Conference's General Counsel and by the National Council of Catholic Laity. Even in those early days, the Committee expressed concern over the potential, wide-ranging impact of ERA upon our laws and social structures. Consistent with the cautions expressed by that Committee, our Conference took no position on ERA in 1972.

In 1975, the Committee on Women in Society and the Church confirmed its earlier position. At the same time, it reiterated its firm opposition to legislation and practices which discriminate against women. In 1978, the question of support for ERA was again considered, and the Administrative Committee issued the following statement. "We share the desire of our Ad Hoc Committee on Women in Society and the Church to indicate support for women's equality under the law. At the same time we believe it would not be appropriate for us to authorize issuance of a statement in support of the Equal Rights Amendment because of uncertainty as to its legal and constitutional consequences for family life, the abortion issue, and other matters. While reaffirming our support for women's rights and our determination to continue to work for them, we conclude that there are insufficient grounds for us as religious leaders to approve a change in our Conference's policy first stated in 1972 and reaffirmed in 1975".

Because the ERA was not ratified by three-fourths of the states within the time provided by Congress, it was reintroduced early last year in the 98th Congress. By the summer of 1983, the intense public debate had yielded voluminous testimony, articles and other publications analyzing the ramifications of ERA in a host of areas of social and pastoral concern. To mention only several, they include abortion, the military conscription of women, the legitimation of homosexual marriage, jeopardy to the tax-exempt status of churches and other organizations, family laws relating to divorce, custody and property rights, and so on. It is fair to say that the ventilation of issues was by then extensive, yielding a wide diversity of opinion and views.

In this context, at its meeting in September last year the Administrative Committee decided that it would be appropriate to reassess the implications of ERA. As a result, our General Counsel, Wilfred R. Caron, was requested to undertake a review and analysis of the principal legal ramifications of ERA. Very soon afterwards and somewhat unexpectedly, events in the House of Representatives unfolded in a rapid and extraordinary manner.

On November 7, 1983 Congressman F. James Sensenbrenner of Wisconsin proposed an amendment intended to avert the dual potential of ERA to buttress the Roe v. Wade right to abortion, and to require public funding of abortion. His amendment provided: "Nothing in this article shall be construed to grant or secure any right to abortion or the funding thereof." With the prospect of imminent action on ERA by the House, after appropriate episcopal consultation, our General Secretary wrote on November 8 to members of the House of Representatives and conveyed the Conference's support of this amendment. On November 15, 1983 a motion was made to bring ERA before the full House under a suspension of the rules, which would have the effect of limiting debate and precluding amendments. The motion failed, and there was no vote on the merits of ERA at the time.

In the wake of these events, the Committee for Pro-Life Activities, chaired by Joseph Cardinal Bernardin of Chicago, focused sharply upon the implications of ERA in the area of abortion. After due deliberation, and guided by our General Counsel's legal assessment, that Committee reinforced the conclusion that an amendment of the type sponsored by Congressman Sensenbrenner was essential. On behalf of his committee, Cardinal Bernardin rendered the following report to the Administrative Committee at its meeting last March:

1. The ERA poses several problems, one of which is its relationship to abortion. While the legal analysis of the several issues has not been completed, the research on the abortion issue alone has led us to the conclusion that the position of neutrality taken by the Administrative Committee must be reconsidered.

2. Therefore, without attempting to evaluate any other question of the relationship between the ERA and abortion, unless and until this question is resolved by amendment or other appropriate means, the Pro-Life Committee recommends a position of non-support in place of the current position of neutrality.

3. We also recommend that the body of bishops be involved in the discussion of this recommendation so that all aspects of the question -- moral, legal, and pastoral -- may be taken into account. In this way, the bishops will be more supportive of the final question.

4. We further recommend that in the public presentation of the Conference's position, our commitment to the promotion of women's rights be clearly affirmed as well as the reasons why we cannot endorse this particular legal instrumentality to ensure equal rights.

After discussion of this report, the Administrative Committee unanimously approved the following motion:

a. that we authorize the establishment of an Ad Hoc Interdisciplinary Committee to study the issue of ERA in all its aspects;

b. that we authorize Conference spokesmen to reaffirm in an appropriate way:

   1. that a Sensenbrenner type amendment is needed to remove any connection with abortion or abortion funding from the ERA; if such an amendment is not passed, then this would present a serious moral problem which would cause us to oppose the ERA;

   2. as a follow up to that reaffirmation made by the Conference's leadership the Pro-Life Committee would provide appropriate material to help explain the position that has been taken; and,

   3. finally, such a reaffirmation would be made in the context of our reaffirming our commitment to the promotion of women's rights as well as the reasons why we can not endorse this instrumentality.

After these decisions were made, I agreed to serve as chairman of the Ad Hoc Committee. A desirable diversity of perspective was accomplished when the following members also agreed to serve: Cardinal Bernardin, Archbishop John J. O'Connor of New York, Bishop Anthony J. Bevilacqua of Pittsburgh, Bishop Joseph L. Imesch of Joliet, and Bishop Edward T. Hughes of Philadelphia. The members in addition to Cardinal Bernardin are the chairmen, respectively, of the Committees for Social Development and World Peace, Canonical Affairs, Women in Society and the Church, and Education.

At this point, I cannot help but dwell, for a moment, upon the heart of the difficulty which has led us to our present position. On the one hand, both as Bishops and just fair-minded people, we are unreservedly committed to justice between the sexes, both as a matter of public law as well as in the affairs of the Church. O[illegible] the other hand, the legal instrumentality of the ERA which is [illegible]tended to perfect the principle as a matter of public law has [illegible]duced potential ancillary effects which have justifiably caus[illegible]oncern, and even alarm, to many whose commitment to ju[illegible]e is beyond question. It is just this tension which ha[illegible]d us to a pastoral prudence in choosing the position of neut[illegible]ity which, thus far, has been conditioned by one vital correct[illegible]n of ERA in the area of abortion. As I shall report, although the gravity of other issues is also cause for deep concern and reassessment, my committee does not recommend change in the Conference's position at this time.

At the meeting of the Administrative Committee in September, I made an interim report on the work of the Ad Hoc Committee, in particular the progress of the General Counsel and his staff in preparing the necessary legal analysis and assessment of the ERA. In substance, I recommended that the Conference continue to emphasize its support of the authentic ERA objective of equal justice for men and women, while recognizing that in its present form and legislative context ERA carries serious risks which could warrant opposition. Notwithstanding, I proposed that we should take no public position against ERA at this time.

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Subsequent to that meeting, our General Counsel completed his report and analysis, and each of you was sent a copy early last week.

The General Counsel's report is comprehensive, compact and carefully nuanced to suit the subtleties of analysis. It is scholarly yet practical, sometimes technical yet understandable, lengthy but to the point. It would be a disservice to the document, and certainly to its important subject matter, to attempt a summary. I therefore invite, indeed urge, all interested persons to obtain and review the document. Accordingly, I present the following introduction.

The report consists of eight sections, the first two of which are of an introductory and general nature, setting the general context for the more analytical treatment which follows. Section I states the general purpose of ERA, recognizes the historical inequities wrought by laws which sanctioned or permitted a capricious disparity in the rights of men and women, and notes the evolutionary process by which an enlightened appreciation of the equal dignity of all has produced significant advances in the law. Section II points up the absence of meaningful legislative history of ERA as a source for guiding the inevitable process of judicial interpretation, and discusses the principles of interpretation which will guide that process. Emphasis is placed upon the need for maximum clarity of text.

The next three sections analyze and discuss each of the sections of the ERA. Section III of the Report deals with the three basic components of the substantive portion of ERA, namely (1) equality of rights under the law, (2) denial or abridgement by the United States, or by any state, and (3) on account of sex. Section IV deals with the enforcement provision of ERA which confers broad authority upon the Congress to enforce ERA "by appropriate legislation." Section V briefly notes the final provision of ERA which defers its effective date for two years after ratification to allow the federal and state governments sufficient time to conform their laws and practices to the requirements of ERA.

These first five sections of the General Counsel's Report contain observations and analyses which are crucial, in varying degrees, to an understanding of the three sections which follow. Those sections address (1) the anticipated salutary effects of the ERA, (2) points of significant concern to churches and the people they serve, and, finally, (3) the General Counsel's conclusion.

The first of these, section VI, recognizes the impracticability of attempting a precise and comprehensive assessment of the salutary effects of ERA under federal law and the laws of the fifty states. However, on the basis of an exhaustive analysis of the available commentary - numerous examples of which are cited - the General Counsel concludes in an Overview that "...although there is great diversity of opinion regarding the probable, salutary effects of ERA, a significant body of opinion envisions important strides in the direction of fair and equal treatment irrespective of sex." He also observes: "In addition to its legal effects, ERA could also perform an important symbolic function. As part of our fundamental law, ERA would exemplify the nation's commitment to the principle of equal rights for individuals regardless of their sex. The legal and extralegal impact of ERA could work in tandem to provide women new opportunities, increased self-esteem, and psychological motivation to expand their horizons."

Because of their importance relative to other issues, the General Counsel's Report discusses two federal and two state areas in which ERA may have meaningful effects. The federal areas are social security and military service. As for the former, the Report observes that there is an expectation that ERA will yield greater equity in the benefits available to women by overcoming the adverse effects on benefits, for example, of unemployment by reason of the responsibilities of motherhood, and the like. As for the military, the Report notes there is a perception that ERA will lead to a greater participation by women which will open up educational and other benefit opportunities to a greater number of women.

With regard to salutary effects upon state laws, our General Counsel has selected two areas for particular comment, namely, family law and employment law . In the former area, among other points he refers to the potential for more equitable custody and property adjudications in matrimonial cases, which will be based entirely on relevant circumstances, without the intervention of sex-based presumptions such as, for example, the primary support obligation of the father. As for employment law, he includes the prospect of eliminating such unfair practices as exclusion of women from certain occupations for which they are otherwise qualified.

Further illustrations are both impractical and unnecessary for purposes of this report. At this point, I would simply join in this observation of the General Counsel: "ERA would buttress the cause of fair treatment under law for all, particularly women." I shall now turn to Section VII of the report which is entitled: "Implications of Concern For Churches and the People They Serve." However much we may wish it were otherwise, the fact is that there are also significant negative implications under ERA.

The General Counsel's Report focuses on five categories of major concern. They are the impact of ERA (1) on abortion and the public funding of abortion, (2) rights of homosexual persons, (3) the tax-exempt status of Church organizations, (4) the participation of Church organizations in government aid programs, and (5) religiously-based exceptions in anti-discrimination statutes. The Report devotes about ten pages of text and sixty-five footnotes to the analysis of these points. I shall not attempt a discussion of each, although I do think it appropriate to restate part of the discussion pertaining to abortion in view of our position that there is need for a Sensenbrenner type of amendment.

In his Report, Mr. Caron states, in part: "...it is reasonable to consider ERA as possessing the potential to buttress the substantive right of abortion. The possible permutations of fact and legal principle under the Roe v. Wade doctrine have not been exhausted. There is some room for the regulation of the abortion right based upon the compelling interest of the state in the life and health of the mother (second and third trimester) and unborn child (third trimester). This approach in the theory of the cases has already been criticized by three members of the Supreme Court, and the future course of the law seems somewhat uncertain. Although it is unlikely the Court will overrule the Roe v. Wade line of cases in their fundamental precepts, it is not unreasonable to anticipate more favorable consideration of well-founded restrictions of abortion in the law. The present Court has manifested its willingness to reassess its decisions in other vital areas, and no reason appears why abortion must be an exception to that salutary process.

"These observations counsel a sensitivity to the more subtle potentialities of ERA in the field of abortion. If there is any room for the meaningful restriction of abortion under present legal theory or future holdings, ERA could serve to diminish those prospects."

As for the public funding of abortion, the Report states, in part: "Although Roe v. Wade and other cases have established a women's right to terminate her pregnancy, there is presently no federal constitutional right to public financing of abortion....

However, under ERA it is likely that funding restrictions would be invalidated if certain established principles are applied.

"Like pregnancy and childbirth, abortion is a procedure which only women can undergo. Because ERA would probably render sex-based classifications suspect in the sense that term is used under the Equal Protection Clause, a law excluding abortions from a governmentally-sponsored, comprehensive medical program would be subject to strict judicial scrutiny. The Supreme Court has already held that the government's interest in fetal life does not become compelling until after viability. Consequently, a law excluding pre-viability abortions from a comprehensive health benefit program might well not survive strict judicial scrutiny, whether the program is based on the state's interest in fetal life or in encouraging childbirth over abortion. Further, in view of the mother's somewhat qualified right to terminate her pregnancy after viability, the same result could follow for this period of gestation as well."

The Report acknowledges a recent case in the Commonwealth Court of Pennsylvania in which a divided court concluded that the medicaid exclusion of funding for most abortions did not violate Pennsylvania's ERA. It points out, however: "The decision has been appealed to the Pennsylvania Supreme Court. The fact that the court was divided points up the genuineness of this question with respect to the federal ERA. The case also confirms the difficulties of predicting results under ERA. Further, one decision involving a state ERA by a state intermediate appellate court is of slight precedential value. Especially is this so since the court did not apply the standard of strict judicial scrutiny, as ERA seems likely to require."

As I said earlier, there are other issues of major concern which are developed in the Report of General Counsel. The constraints of time oblige me to refer you to that document.

The eighth and final section of the General Counsel's report is his conclusion. I commend it, and call your attention particularly to this final portion: "A due regard for our national repository of the powers of government and the rights of the people demands precision both of purpose and expression. It is true, of course, that it is not possible to draft an ERA in a way which makes its future application entirely predictable. Every contingency cannot be envisaged. On the other hand, it is possible to draft an ERA which, illumined by a well-focused legislative history, will avoid major pitfalls which are now readily identifiable. Unlike statutes which are always subject to amendment by the legislature when deficiencies appear, if ERA is ratified its course and effect will be in the hands of the judicial branch.

"There is no concern which cannot be resolved, at least substantially, while still preserving the integrity of the economic and kindred goals which women seek to achieve and to which their dignity entitles them. I would counsel constructive endeavors to achieve greater clarity in service to those goals. Because the legal analysis related to these issues is so complex, and often open to honest differences of informed opinion, the effective level of resolution is that of consensus on policy and draftsmanship - not legal disputation. If there is disagreement on the policy to be established, that should be straightforwardly addressed. If there is not, good faith will find a way to express the policy in reasonably clear and effective terms, buttressed by meaningful legislative history."

As I have said, the Ad Hoc Committee on the Equal Rights Amendment does not now recommend a change in the Conference's position. However, it does suggest that the present text and legislative context of ERA demand serious reflection and a reasoned objectivity by all who must judge its value as an amendment to our Constitution. It is our hope that the Report of our General Counsel will contribute significantly to the process, and to that end we have authorized its public distribution. Meanwhile we continue to reserve definitive judgment on the proposed ERA as we continue to hope for a more fully developed formulation of the amendment. Such a version would, we believe, attract wider acceptance from all Americans and the Congress.

Although my report neither seeks nor requires the action of this body, it does initiate a new phase in our consideration of the ERA. Until now, our formal deliberations have been at the level of the Administrative Committee and other Committees of Bishops, taking into account the numerous informal comments received from many other sources, including other Bishops. Today marks the beginning of consideration by the entire body of Bishops. Beyond that, we also hope to receive the views and opinions of all interested groups and persons, so that our insights and reflections may be as complete as possible. We shall be attentive to future proceedings in the Congress which will determine the final text and legislative history by which the ERA must eventually be assessed. If circumstances should warrant, our Committee will make a further report.

I realize this has been a lengthy report. Thank you very much for your patient attention.

For Release at 10:30 a.m. on November 15. No Print or Broadcast Use May Be Made of the Material Before That Time.

The Equal Rights Amendment: A Legal Assessment

by

Office of General Counsel
United States Catholic Conference

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Office of General Counsel

October 23, 1984

MEMORANDUM

TO: Administrative Committee (NCCB)

FROM: Wilfred R. Caron*

RE: The Equal Rights Amendment

The analysis which follows presents the salient legal considerations which should be taken into account in assessing the moral, social and other implications of the Equal Rights Amendment ("ERA").[1]

I. INTRODUCTION

The ERA is rooted in the proposition that one's measure of justice under the law should not be diminished by the fact that the person is male or female. It would engraft on the Constitution a discrete application of the guarantees of the Fifth and Fourteenth Amendments that all are entitled to "equal protection" under law.

In 1972 ERA's general purpose was explained as follows in the Report of the Senate Committee on the Judiciary:

> The basic principle on which the Amendment rests may be stated shortly: sex should not be a factor in determining the legal rights of men or women. The Amendment thus recognizes the fundamental dignity and individuality of each human being. The Amendment will affect only governmental action; the private actions and the private relationships of men and women are unaffected. And the Amendment only requires equal treatment of individuals....[2]

---

* I wish to acknowledge the dedicated efforts of my staff, particularly of these lawyers: Mark E. Chopko, Deirdre Dessingue, Katherine G. Grincewich and John A. Liekweg.

As a cosponsor, Senator Hatfield offered much the same explanation when ERA was reintroduced in the Senate on January 26, 1983.[3] Such explanations are useful guides to the general intent of ERA, but they do not lay bare the legal complexities which will ultimately shape its precise effects through the judicial interpretive process.

The laws of the several states, in their diversity, have reflected the views of society with respect to the "role" of women and men. Whether the product of a protectionist view or actual bias, the law has failed at times in its duty of fairness. However, an objective response to this historical reality will also recognize that the enlightenment of the day has led to state and federal legislation which seeks earnestly to strip away unjust distinctions based on sex.

Clearly, the evolutionary process is incomplete, despite significant strides in the law, including state ERAs and federal and state legislation targeted against sex discrimination. For example, federal statutes require equal pay for equal work, and prohibit discrimination on the basis of sex in public and private employment and in education programs receiving federal financial assistance.[4] However, remedial federal statutes are perceived by many as a piecemeal approach of too great uncertainty because they are subject to amendment and uneven administrative enforcement. Similarly, state ERAs do not provide a uniform, national solution because the majority of states have not adopted an ERA and, even where they exist, interpretations can vary from state to state.[5]

A federal ERA is considered necessary in order to achieve a durable, uniform resolution to a national inequity. Its proponents are persuaded that the equal protection guarantees of the Fifth and Fourteenth Amendments are inadequate because, in their view, they have not been construed by the judiciary with sufficient rigor in reviewing statutory and other classifications based on sex. In essence, ERA proposes to superimpose a more stringent standard upon constitutional equal protection guarantees in the discrete area of sex-based classifications. Whether it would is a question worthy of most thoughtful reflection in view of the invalidation of statutes which have discriminated on the basis of sex (discussed below at 6), experience with comparable state ERAs (discussed below at 6), and the political and philosophical realities in our contemporary society.

II. THE JUDICIAL INTERPRETIVE PROCESS

The ERA will mean what the judiciary declares it means, within the somewhat flexible bounds of the canons of construction (discussed below). The ultimate interpretive authority will be the United States Supreme Court. The course of this process will turn upon the language of ERA and its legislative history. Legislative clarity will give direction to this process and better assure fidelity to the will of the people.

A. Legislative History of ERA

To the extent that legislative history may be considered by the judiciary in determining the meaning of law (discussed below), the history of ERA thus far will do little to illuminate its terms in many areas of interpretational controversy and concern.

The present ERA was introduced in both houses very early in the first session of the 98th Congress which adjourned on October 12, 1984. In the House of Representatives hearings were held in 1983 on the proposed ERA; it was reported favorably by the House Judiciary Committee with no amendment. On November 15, 1983 a motion was made to bring ERA before the full House under a suspension of the rules, which would have the effect of limiting debate and precluding amendments. The motion failed, and there was no vote on the merits of ERA at that time. The ERA has not been brought back before the full House, nor have committee hearing records or committee reports been published.

In the Senate, the Subcommittee on the Constitution of the Committee on the Judiciary held a series of hearings. No hearing records have been published to date, and the Subcommittee took no final action.

In short, the pertinent legislative history of ERA remains to be developed if it is materially to influence judicial interpretation in significant areas of concern. Yet, hope for effective clarifying history must fade somewhat in view of the course of debate thus far. For example, in response to questions on ERA's impact in several sensitive areas (e.g., abortion, tax exemption, and private education), a cosponsor repeatedly indicated that the courts would have to resolve these issues.[8]

In the present state of the record, the canons of judicial construction take on considerable importance.

B. Canons of Construction

Courts approach the problem of interpretation on two levels - intrinsic construction (dealing with the structure and language of the text) and extrinsic construction (dealing with history and related statutes).[7] Constitutional provisions are generally subject to the same rules of construction as are statutes.[8] Courts look first to the text of the law to discern whether the meaning is plain. If the text is plain and unambiguous, courts need not look to legislative history[9] although they often have not hesitated to do so.[10] However, if language is open to more than one interpretation, courts will examine legislative history for evidence of legislative intent.[11] Nevertheless, when reviewing legislative history, a court will avoid what Justice Jackson called the "psychoanalysis of Congress." [12]

Legislative history is not very useful unless it is clear and authoritative. Courts examine a variety of legislative materials. Reports of the Committee which heard testimony of interested persons and actively considered the text of the legislation are usually most persuasive in judging the intent of the legislature.[13] Courts will also examine reports of Conference Committees and floor debates where those reports or debates explain various textual changes which were made outside of Committee.[14] Generally, however, remarks in the course of debates or hearings, except by the sponsors or drafters, are entitled to little weight.[15] Statements of single legislators, even sponsors, are not controlling.[16]

The lack of relevent, useful legislative history, however, does not relieve courts of the duty "to give faithful meaning to the language Congress adopted in light of the evident legislative purpose in enacting the law in question."[17] When the statute itself is ambiguous, courts must construe it in the manner which best effectuates its policy.[18] Where a statute expresses broad national policy, such as is often found in constitutional provisions, courts construe terms broadly to satisfy congressional objectives.[19] This canon accords with another generally accepted rule of interpretation: a court will liberally construe remedial legislation, such as antidiscrimination laws, in order to carry out the purposes of the enactment.[20] The rule of liberal construction compounds the problems of ambiguity. Among other things, ambiguity invites a judicial subjectivism which declares what Congress "must have" meant.

A British jurist once stated this salutary principle regarding legislative drafting:

> [I]t is not enough to attain a degree of precision which a person reading [a law] in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand.[21]

In the end, the limitations of language as a means of conveying ideas makes it important also to stress the importance of clarity of legislative purpose as a most reliable guide to judicial interpretation.[22]

III. ERA SECTION 1 - ANALYSIS OF MAJOR COMPONENTS

In very general terms, section 1 contains the substantive provisions of ERA, and section 2 authorizes Congress to enact laws to enforce those provisions. The text is identical to that of the unsuccessful amendment approved by the 92d Congress in 1972. Section 1 provides:

> Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

In particular cases, the issue could well require the interpretation of practically any single word. For present purposes, however, it seems sufficient to consider its principal components, namely (1) equality of rights under the law, (2) denial or abridgement by the United States or any state, (3) on account of sex.

Before addressing those components, it will be useful to consider the principles of judicial review which measure the limits of constitutionally permissible governmental discretion in prescribing classifications of people in regard to their rights, privileges and immunities, and the level of review likely to apply to ERA.

A. Judicial Review of Sex-Based Classifications Under ERA

The equal protection precedents declare that statutory classifications are subject to three different levels of judicial scrutiny, depending on the type of classification involved. A major objective of ERA is to subject sex-based classifications to a strict judicial scrutiny, akin to that applied to racial classifications under the equal protection guarantees of the Constitution. Classifications which burden fundamental constitutional rights (e.g., free speech and free exercise of religion), or which are based on race or national origin, are subject to strict scrutiny. Racial classifications are considered inherently "suspect." They are presumptively invalid[23] and are unlikely to survive strict scrutiny analysis.

Classifications based on sex have been subject to an intermediate level of scrutiny. They are upheld only upon a showing that the classification serves important governmental objectives and is substantially related to the achievement of those objectives.[24] Classifications premised upon the alleged inherent handicap, weakness or inferiority of a gender are not deemed legitimate governmental objectives under the Equal Protection Clause. In recent years, the following classifications based on sex have been invalidated: (i) a statute that gave the husband the unilateral right to dispose of jointly owned property without his wife's consent;[25] (ii) a law under which survivor benefits paid to a husband in case of his wife's work-related death were less than those payable to a similarly situated widow;[26] (iii) a statute that provided a shorter period of parental support obligation for female children than for male children;[27] (iv) a provision in the Social Security Act granting survivors' benefits to widows but not widowers;[28] (v) a statute containing a mandatory preference for male applicants;[29] and (vi) an arbitrary preference in favor of males in the administration of decedents' estates.[30]

In general, other classifications are subject only to the requirement that they be rationally related to a legitimate governmental interest.[31] Classifications subject to this test are routinely upheld, in due deference to government's need to make reasonable classifications as it carries out its functions.

It is likely that the courts would employ the standard of strict scrutiny, effectively treating classifications based on sex as inherently "suspect." To withstand strict scrutiny, gender-based classifications would have to further a "compelling governmental interest." As noted, this level of scrutiny has routinely led to the invalidation of racial classifications under the Equal Protection Clause. However, it is unlikely that "strict scrutiny" review will be as preclusive under ERA. There will likely be situations in which courts will uphold gender-based classifications (e.g., rape laws) as has happened with some state ERAs.

B. "Equality of Rights" - Analogous State ERAs

Of the sixteen state ERAs, only eight employ the phrase "equality of rights" (or like language) as does the federal ERA.[32] The interpretation of such a phrase varies among the states, and even within a single state. The articulated standard of equality ranges from what may be termed absolute equality between men and women, to different treatment provided a rational basis exists.

The Maryland, Pennsylvania, and Washington ERAs have been interpreted to mandate an absolute standard of equality more stringent than traditional strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[33] However, even under an allegedly absolute standard, courts have carved out exceptions where differentiation between the sexes is based on unique physical characteristics.[34] Additionally, the Pennsylvania Commonwealth (appellate) Court has upheld a medicaid exclusion of abortion on the ground that the exception was based on indigency, not on gender (discussed below at 18).[35] The Colorado and Massachusetts ERAs have been interpreted to require strict judicial scrutiny,[36] as is required by the Fourteenth Amendment for racial classifications. This standard, too, has been interpreted to permit exceptions for unique physical characteristics. Where different treatment is reasonably and genuinely based on such characteristics, the sexes are not considered similarly situated and, thus, equal treatment is not required.[37]

In Hawaii, while not articulating precisely the required standard, a court has indicated that the state ERA may mandate a higher standard than strict scrutiny.[38] However, in upholding a gender-based rape statute on the grounds that the differentiation was based on unique physical characteristics, the court resorted to the Fourteenth Amendment standard for sex-based distinctions, i.e. substantial relationship to government interests.[39]

The Texas Supreme Court has not addressed the standard of equality required by that state's ERA. However, intermediate appellate courts have dealt with the issue with different results. One held the ERA required strict scrutiny with exceptions for unique physical characteristics, countervailing constitutionally protected rights, and other compelling state interests.[40] The other held that ERA required application of only the rational relationship test.[41] Finally, the standard of equality remains unclear in at least one state.[42]

In summary, the meaning of "equality of rights" is not uniform under the state ERAs. Nonetheless, it is fair to say generally that state ERAs have been interpreted to guarantee the same rights as are guaranteed under the Equal Protection Clause for racial classifications, with the most prevalent exception being for classifications justified by unique physical characteristics. Title VII of the Civil Rights Act of 1964 [43] (prohibiting sex discrimination in employment) has been similarly interpreted where unique physical characteristics have been involved. The Supreme Court upheld the exclusion of pregnancy from an employer's disability policy against claims that it violated sex discrimination provisions of Title

VII.[44] Because pregnancy is significantly different from the usual covered diseases or disabilities, the Court held that its exclusion was not the result of sex discrimination but of legitimate distinctions among medical conditions.[45]

The phrase "equality of rights" does not appear to convey, by itself, a meaning other than the concept of fair and equal treatment under the equal protection guarantees of the Fifth and Fourteenth Amendments. The Supreme Court and lower federal courts have analyzed the phrase "equal rights" and like language in jurisdictional statutes affecting statutory and constitutional civil rights claims.[46] Specifically, the Supreme Court cited the origin of the relevant language in the Civil Rights Act of 1866 from which the Fourteenth Amendment evolved, and concluded that laws providing for "equal rights" are comparable to this Fourteenth Amendment forerunner.[47]

C. "On Account of Sex" - Gender vs. Sexual Preference or Orientation

The text of ERA suggests no meaning for the phrase "on account of sex" other than the usual meaning of gender.[48] The cosponsors have consistently indicated this understanding of the term,[49] as distinguished from sexual or affectional orientation or preference ("sexual preference"). In fact, Senator Hatfield cited favorably the fact that no state ERA had been interpreted as invalidating laws prohibiting the marriage of homosexual persons.[50] However, in 1972 Senator Sam Ervin warned that ERA could invalidate laws forbidding same-sex marriage and certain homosexual activity.[51] Some ERA commentators perceive the same result.[52] Recently, several witnesses before the Senate Judiciary Subcommittee on the Constitution questioned the view that ERA would not undermine laws regulating homosexual conduct if they apply equally to male and female homosexuals.[53]

Courts interpreting Title VII consistently have rejected claims that sex discrimination includes employment discrimination against homosexuals or transsexuals.[54] As one court put it, reading Title VII to cover such claims would be "impermissibly contrived and inconsistent with the plain meaning of the words."[55] In the present state of the law, it is unlikely that the term "sex" in ERA would be construed other than as referring to discrimination between the genders. Yet, recent legal developments involving the right of privacy in the field of abortion and kindred areas do not put a more liberal view of the term sex beyond the range of possibility,[56] at least in the absence of more precision in the text or compelling legislative history.

D. Discrimination - Intent or Effect

The phrase "on account of" usually means "by reason of" or "because of"[57] and would seem to indicate that, on its face, ERA is intended to reach only intentional discrimination.[58] However, ERA could possibly reach other actions which have a discriminatory effect on one gender or aid discriminatory institutions. If ERA were to yield the latter result, its reach could be substantially broader than that of the equal protection guarantees of the Fifth and Fourteenth Amendments.

Prior to 1976 there was some question regarding the appropriate test to be used in race discrimination cases brought under the Equal Protection Clause. Then the Court enunciated "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[59] The Court observed that the discriminatory purpose might be found in a statute itself, or its application in an intentionally discriminatory manner. Subsequently, the Court upheld veterans' preferences in state civil service employment, despite their disparate effect on women, because there was no showing of purposeful discrimination against women.[60] Supporters of ERA have indicated that the result would have been different under ERA.[61]

By analogy to the Equal Protection Clause, ERA could also be interpreted to prohibit the government from aiding private institutions that discriminate on the basis of sex. Earlier cases involving desegregation of public schools have held that government programs are invalid under the Equal Protection Clause when they have the impermissible effect of providing significant aid to private, racially discriminatory institutions.[62] A lower court recently held that equal protection principles prohibited a federal agency from funding local agencies which it knew or should have known were engaged in racial discrimination.[63]

E. Denial or Abridgement of Rights "by the United States or by any State"

The ERA explicitly addresses only actions taken "by the United States or by any state." That it is not intended to reach the private acts of individuals or organizations seems clear from its language and its sparse legislative history. However, in certain situations ERA could be made applicable to private organizations. The Fourteenth Amendment has been applied to private activity because of significant state involvement in that activity.[64] A similar result can be expected under ERA.

The Supreme Court employs several principles in determining whether the actions of a private organization will be deemed state action, thereby subjecting that organization to the requirements of the Fourteenth Amendment. First, there must be a nexus between the state and the challenged action of the private entity so close that the action may fairly be deemed that of the state itself.[65] Second, private discriminatory action may be considered state action where the state has required it, or has provided such significant encouragement that the action must in law be deemed that of the state.[66] Third, the required nexus may be present if the private entity has exercised powers that are traditionally the exclusive prerogative of the state.[67] The ultimate issue for analysis is whether the alleged infringement of constitutional rights is "fairly attributable to the state."[68] Only by sifting facts and weighing circumstances can the significance of state involvement be judged.[69]

Applying these principles, the Court has found state action where private individuals or organizations (i) acted in concert with state officials, or under compulsion of state law, to deprive individuals of property or other protected rights; [70] (ii) had a symbiotic relationship with a state from which the state received financial benefits from discriminatory acts; [71] and (iii) utilized the judicial system to attempt to enforce a restrictive property covenant based on race.[72]

By analogy, under ERA private organizations which engage in sexually discriminatory practices would not likely be subject to ERA's prohibitions unless those practices were attributable to a governmental decision or the government was significantly involved in the discriminatory practices. Under the Court's recent analysis,[73] receipt of substantial governmental benefits alone would not subject a private organization (e.g., a private, single-sex school) to ERA's requirements. However, it must be cautioned that "state action" is a developing concept whose full implications cannot be assessed. The extent to which private organizations would be affected by ERA will depend, in part, on the development of state action doctrine under ERA. The relevance of this consideration to church institutions is discussed below at pages 23 and 24.

IV. ERA SECTION 2 - ENFORCEMENT

Section 2 provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This provision is identical to the enforcement section of the Fourteenth Amendment, and is similar to enforcement provisions in six others.[74]

Under existing federal statutes,[75] a citizen affected by sex discrimination could sue for declaratory and injunctive relief to redress a violation of rights under ERA. When enacted in the nineteenth century, the Civil Rights Acts were aimed at eliminating racial discrimination.[76] Over time, the Court has expanded its understanding and use of the Fourteenth Amendment and has applied it to invalidate gender-based discrimination.[77] Accordingly, a lawsuit under existing Civil Rights Acts may be used to enjoin gender-based discrimination.[78] Because the Supreme Court has held that such lawsuits are not limited simply to civil rights legislation but available to vindicate all federal rights[79], the same provisions may be used to enforce the ERA. Thus, existing federal law provides a substantial enforcement mechanism if ERA is enacted.[80]

In addition, the Congress will have the discretion to enact laws "necessary and proper" for the uniform interpretation and enforcement of ERA.[81] Under its enforcement authority, the Congress is not limited to those matters which a court itself would void as unconstitutional. Rather, the Congress through legislation may affirmatively protect rights and declare certain acts illegal in order to enforce the Amendment.[82] Thus by reference to Fourteenth Amendment principles, a court would interpret ERA as authorizing the Congress to enforce ERA guarantees by any rational means.[83]

Constitutional provisions like ERA and the Fourteenth Amendment, and related statutes, are liberally construed.[84] It is reasonable to expect judicially created private rights of action under ERA which are not expressly provided under existing statutes.[85] The Supreme Court allowed a private right of action for sex discrimination under federal civil rights legislation.[86] It concluded that, by enacting the statute in question, Congress intended to benefit women as a special class; that civil rights legislation was intended to be construed broadly; and that the private right of action would promote the congressional policy against discrimination.

V. ERA SECTION 3 - EFFECTIVE DATE

Section 3 of ERA provides that it "shall take effect two years after the date of ratification." The rationale for such a delay is explained in the 1972 Report of the Senate Committee on the Judiciary:

> The purpose of this section is to give the States

> and the federal government an opportunity to review and revise their laws, regulations and practices so as to bring them into compliance with the Amendment.[87]

The drive for ratification of the 1972 ERA has been credited with contributing to important reforms in some states.[88] It is reasonable to assume that, with ratification of ERA, the states and the federal government would make additional efforts to bring their laws, regulations and practices into conformity with ERA's mandate.

VI. SALUTARY EFFECTS OF ERA

ERA would buttress the cause of fair treatment under law for all, particularly women. Its effects would reach an array of legal areas and social relationships in jurisdictions (state and federal) so numerous that they defy comprehensive and precise analysis in this document. In fact, and understandably, no document has provided such an analysis.

A. An Overview

It is fair to say that although there is great diversity of opinion regarding the probable, salutary effects of ERA, a significant body of opinion envisions important strides in the direction of fair and equal treatment irrespective of sex. I say this based upon our exhaustive review of most if not all of the available, significant testimony and written commentary on the subject, principal examples of which are cited below.[89] Thus, ERA is regarded by many as a means of enhancing the economic situation of women by (i) eliminating state and federal laws or practices that exclude women from certain employment opportunities, or otherwise limit their participation,[90] (ii) providing for more equitable ownership and control of property acquired during marriage,[91] (iii) requiring more equitable treatment for women under the social security system and statutes regulating private pension plans,[92] (iv) expanding opportunities for women in the military,[93] (v) eliminating sex-based wage discrimination in public employment,[94] and (vi) lowering the cost to women of certain kinds of insurance.[95]

In the important area of education, the 1972 Senate Report stated that "ERA will require that State supported schools at all levels eliminate laws, regulations or government practices which exclude women or limit their numbers."[96] In the particularly complex area of athletics, ERA could provide an effective means for attaining equal athletic opportunity for women, including sex-neutral rules, equal per capita expenditures, and the creation and implementation of affirmative action programs.[97] Exceptional female athletes could be allowed to compete with the best male athletes in their communities.[98] In addition, many view ERA as an effective bar to sex discrimination in other areas such as in criminal law (*e.g.*, sentencing and prison reform)[99] and domestic relations law.[100]

In addition to its legal effects, ERA could also perform an important symbolic function. As part of our fundamental law, ERA would exemplify the nation's commitment to the principle of equal rights for individuals regardless of their sex. The legal and extralegal impact of ERA could work in tandem to provide women new opportunities, increased self-esteem, and psychological motivation to expand their horizons.[101]

B. Impact on Discrete Areas of Federal Law

Because of their importance, it will be useful to review briefly the potential of ERA in two areas of federal law, *i.e.* the law governing the social security system and the military. These have generated much discussion.

1. Social Security

There is an increased public awareness and concern over the numbers of women living in poverty. The plight of older women is of particular concern.[102] Often they must rely on social security payments as their primary means of support. For a variety of reasons (*e.g.*, years spent out of the work force as homemakers, lower average wages, part-time or short term employment), average benefits are lower for women than men under the present social security system. ERA could require revisions in the social security system and pension laws [*e.g.*, the Employee Retirement Income Security Act of 1974 ("ERISA")] to provide for more equitable treatment of women.[103]

If discrimination is measured by effect rather than intent (discussed above at 9), laws which have a "disparate effect" on women would be subject to strict judicial scrutiny under ERA.[104] The perceived flaw in laws such as the Social Security Act and ERISA is that they do not take into account the life patterns of many women, or recognize the economic contribution made by homemakers to the family unit.[105] Thus, it has been observed that ERA would require Congress to review the provisions of the Social Security Act and ERISA, and make amendments where necessary to treat women more fairly.[106] If the "disparate effect" standard were utilized by courts, ERA could lead to additional benefits for women under social security and other statutes affecting retirement. It is beyond the scope of this memorandum to attempt a delineation of what those benefits might be, how they would be funded, or what effect they might have on other participants in the affected programs.

It should be noted that Congress has already taken some steps to eliminate inequities in the Social Security Act and ERISA. In the Social Security Amendments of 1983, certain gender-based distinctions were eliminated from the Social Security Act.[107] Congress also required the Department of Health and Human Services to prepare a report analyzing the potential impact of various "earnings sharing" proposals on the social security system.[108] Generally, under "earnings sharing" the combined earnings of a husband and wife during the period of their marriage would be divided equally between them for benefit purposes, providing each spouse with social security protection in his or her own right.[109] The Retirement Equity Act of 1984 made several amendments to ERISA, designed to provide greater pension equity for women by taking into account changes in work patterns and in marriage as an economic partnership.[110]

2. The Military

The legislative history of the 1972 ERA strongly suggested that ERA could have a substantial impact on the role of women in the military. It indicated that women would be allowed to volunteer for service, and be subject to conscription, on the same basis as men,[111] and that like men, women could be assigned to various duties depending on their qualifications and the service's needs.[112] Although it is incomplete, thus far there is nothing in the legislative history of the present ERA to indicate a contrary intent in this area.[113] Expanding opportunities in the military for qualified women would be beneficial in several respects.[114] It is reasonable to expect that more women would be able to take advantage of the numerous benefits of military service (e.g., education, technical training, medical care and veterans' benefits), and that more women would be eligible for veterans' preferences in government employment.[115]

Regarding combat assignments, it has been observed that only a relatively small percentage of the military actually serves in combat, and only women that could meet the qualifications would be assigned to combat units.[116] Whether present proscriptions[117] against the use of women in combat units would survive judicial scrutiny under ERA will ultimately depend on the standard of review adopted by the courts. If, as some urge,[118] all explicit gender-based classifications would be impermissible under ERA, the survival of a policy prohibiting only women from serving in combat is unlikely.[119] On the other hand, courts have traditionally accorded great deference to Congress in matters involving national defense and military affairs.[120] In the absence of clear legislative history to the contrary, it seems improbable that the judiciary would abandon its usual deference in this sensitive area and invalidate rational, long-standing prohibitions on the use of women in combat units.

C. Impact on Discrete Areas of State Law

Of the various state laws potentially affected by ERA, those dealing with domestic relations and employment are especially important and warrant particular comment.

1. Domestic Relations

Generally speaking, ERA could substantially affect state domestic relations laws. Under ERA, they would have to be based on individual circumstances and needs, not on assumptions based solely on an individual's sex.[121] Thus, a declaration of invalidity is probable with respect to such presumptions that may exist, *e.g.*, the father's primary responsibility for the support of the family.[122] The support obligations of each spouse would be defined in functional terms based, for example, on each spouse's earning power, current resources, and contributions (other than financial) to the family welfare.[123] Upon dissolution of a marriage, it is suggested that ERA would require states to provide for an equitable inter-spousal distribution of assets acquired during the marriage,[124] thereby effectively recognizing the tangible contributions made to the marriage by nonworking spouses (usually women). It should be noted that without ERA, many states have adopted more equitable methods for division of marital property in matrimonial cases.[125]

ERA could require changes in other areas of domestic relations law. Some have concluded that the statutory age at which a state permits an individual to marry would have to be the same for men and women.[126] It has also been suggested that ERA would lead to the invalidation of statutes or practices requiring wives to use their husbands' surnames, or requiring children to use their fathers' surnames.[127] Further, some are of the view that legal requirements establishing the domicile or residence of individuals could not be based on sex, thus eliminating any presumptions that the domicile or residence of a married woman follows that of her husband.[128]

2. Employment

ERA could be violated by laws, to the extent they still exist, that explicitly restrict or limit the occupations or conditions of employment for women only, e.g., laws limiting the maximum number of hours worked, excluding women from working in mines, and requiring rest periods.[129] The 1972 Senate Report indicated that under ERA restrictive laws (e.g., excluding women from certain occupations) would be invalidated, whereas others that are truly protective (e.g., providing rest periods) could be extended to protect both men and women.[130]

ERA would prohibit sex discrimination in employment practices in state and local governments. In this area, ERA would overlap with Title VII of the Civil Rights Act of 1964 and state fair employment practices statutes which now prohibit sex discrimination in public employment. ERA could fill gaps in statutes such as Title VII which does not apply to members of Congress[131] and certain state elected officials,[132] and could provide further impetus for the more vigorous enforcement of antidiscrimination laws and policies.[133]

VII. IMPLICATIONS OF CONCERN FOR CHURCHES AND THE PEOPLE THEY SERVE

The implications of ERA have also given rise to concerns in diverse areas of law and public policy. There follows a discussion of certain areas of major concern to churches and the people they serve. Such an analysis is essential to an objective consideration of ERA, and to provide balance in the public debate by augmenting the available public commentary.

A. Abortion

1. Substantive Abortion Rights

The potential effect of ERA on a woman's right to terminate her pregnancy is limited because Roe v. Wade[134] and kindred cases are the law. Courts will not attribute to Congress an intent to do an unnecessary act.[135] There is no explicit indication in the text or legislative history that Congress intends ERA to reinforce a right of abortion. Indeed, the legislative history reveals the absence of a congressional consensus on abortion.[136]

Notwithstanding the foregoing, it is reasonable to consider ERA as possessing the potential to buttress the substantive right of abortion. The possible permutations of fact and legal principle under the Roe v. Wade doctrine have not been exhausted. There is some room for the regulation of the abortion right based upon the compelling interest of the state in the life and health of the mother (second and third trimester) and unborn child (third trimester). This approach in the theory of the cases has already been criticized by three members of the Supreme Court,[137] and the future course of the law seems somewhat uncertain. Although it is unlikely the Court will overrule the Roe v. Wade line of cases in their fundamental precepts, it is not unreasonable to anticipate more favorable consideration of well-founded restrictions of abortion in the law. The present Court has manifested its willingness to reassess its decisions in other vital areas,[138] and no reason appears why abortion must be an exception to that salutary process.

These observations counsel a sensitivity to the more subtle potentialities of ERA in the field of abortion. If there is any room for the meaningful restriction of abortion under present legal theory or future holdings, ERA could serve to diminish those prospects. In Roe v. Wade, the Court grounded the woman's right to terminate her pregnancy in considerations of her health.[139] The right to protect one's health and reproductive interests is grounded in the constitutional right of privacy.[140] Under ERA, the Court would likely view abortion as a type of medical treatment, although not identical, to other types.[141] Accordingly, there is legitimate concern that ERA could lead to the invalidation of laws which deny to women a right not denied to men, namely, access to forms of medical "treatment" needed to protect health, including abortion. In this way, ERA could buttress the Roe v. Wade right of abortion.[142] It could fortify the principal holding in Roe v. Wade, i.e. the right of privacy encompasses "a woman's decision whether or not to terminate her pregnancy."[143]

2. Public Funding of Abortion

Although Roe v. Wade and other cases have established a woman's right to terminate her pregnancy, there is presently no federal constitutional right to public financing of abortion.[144] The denial of such funding does not deprive women of any constitutional right, including rights under the Equal Protection Clause.[145] However, under ERA it is likely that funding restrictions would be invalidated if certain established principles are applied.

Like pregnancy and childbirth, abortion is a procedure which only women can undergo. Because ERA would probably render sex-based classifications suspect in the sense that term is used under the Equal Protection Clause, a law excluding abortions from a governmentally-sponsored, comprehensive medical program would be subject to strict judicial scrutiny. The Supreme Court has already held that the government's interest in fetal life does not become compelling until after viability.[146] Consequently, a law excluding pre-viability abortions from a comprehensive health benefit program might well not survive strict judicial scrutiny, whether the program is based on the state's interest in fetal life or in encouraging childbirth over abortion.[147] Further, in view of the mother's somewhat qualified right to terminate her pregnancy after viability, the same result could follow for this period of gestation as well.

In a very recent decision, a majority of the Pennsylvania Commonwealth Court upheld the state's exclusion of funding for abortions (with certain exceptions) against claims that it violated the Equal Protection Clause and Pennsylvania's ERA.[148] The court held (two judges dissenting) that the exclusion did not involve a gender-based classification cognizable under that state's ERA. The decision has been appealed to the Pennsylvania Supreme Court. The fact that the court was divided points up the genuineness of this question with respect to the federal ERA. The case also confirms the difficulties of predicting results under ERA. Further, one decision involving a state ERA by a state intermediate appellate court is of slight precedential value. Especially is this so since the court did not apply the standard of strict judicial scrutiny, as ERA seems likely to require.

B. Rights of Homosexual Persons

An issue which has caused concern is the potential of ERA to sanction a homosexual lifestyle by incorporating it in the legal fabric in various ways, for example, by compelling recognition of the marriage of homosexual persons, and by prohibiting employment and like policies which exclude such persons (*e.g.*, in employment by churches and other religious organizations). The implications are self-evident in the discussions below of areas of concern such as ERA's potential effect on tax-exempt status. The issue of marriage is distinct and warrants separate consideration.

Arguments that the refusal to permit same-sex marriages constitutes unlawful sex discrimination have been rejected uniformly. In denying such claims, courts generally have relied upon the traditional definition and usage of the term "marriage" as a heterosexual union.[149] Thus, a Kentucky court held that two persons of the same sex had no constitutionally protected right to marry. It concluded that the two women involved were not prevented from marrying by the statutes of Kentucky, but "rather by their own incapability of entering into a marriage as that term is defined."[150] Most recently, a Pennsylvania Superior Court found that "history, public policy, and ordinary definition argue against expansion of the concept of common law marriage to include same-sex marriages."[151]

Perhaps the most relevant case for present purposes is Singer v. Hara [152] which was decided under a state ERA (Washington) substantially similar to the proposed federal ERA.[153] Singer held that the statutory prohibition against same-sex marriages did not violate the state ERA or the Equal Protection Clause of the Fourteenth Amendment. In the court's view, the state ERA did not create new rights, but merely mandated that existing rights be equally available to members of both sexes. Because by definition marriage is a union between a man and a woman, the court determined that the right sought by applicants did not exist, and therefore they were not denied a "right" (marriage license) on account of sex. The court emphasized the "state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and rearing of children.... [M]arriage exists as a protected institution primarily because of societal values associated with the propagation of the human race."[154] Similarly, in a case not involving an ERA, the court stated: "[I]t seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised."[155]

Some have suggested that ERA's potential for legitimizing marriage between homosexual persons finds support in the miscegenation case of Loving v. United States.[156] In Loving, the Supreme Court held Virginia's miscegenation statutes unconstitutional under the Equal Protection Clause of the Fourteenth Amendment because they were based "solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."[157] The analogy to the Loving case proposes that a law permitting a man to marry a woman, but not a man, creates a classification based solely on sex,[158] and that under the strict scrutiny standard such a classification is as unconstitutional as one based on race.[159]

The analogy to Loving has been rejected in at least two cases based on the essential nature of marriage as a heterosexual union. In one, the court stated Loving does "not indicate that all state restrictions on the right to marry are beyond reach of the Fourteenth Amendment. But in common sense and a constitutional sense, there is a clear distinction between a marital restriction based merely on race and one based upon the fundamental difference in sex."[160] In Singer, supra, the court found in the term "marriage" no sex-based classification which would trigger application of the ERA.[161] This "definitional response" to the issue has been criticized as producing a "chicken-or-egg type of quandary",[162] and as reflecting an anachronistic understanding of the marital institution.[163]

A cautious assessment of ERA in this sensitive area of such pastoral importance cannot overlook the fact that laws, and the interpretation of laws, necessarily reflect the contemporary mores. What seems an ineluctable interpretation of "sex" today ("gender") may seem less clear to some in years to come. Indeed, some commentators have already felt winds of change. One law professor has stated: "[T]he constitutional right to privacy was developed in Griswold v. Connecticut [164] and its progeny because the procreational model of sexuality could no longer be sustained by sound empirical or conceptual argument. Lacking such support, the procreational model could no longer be legally enforced on the grounds of the 'public morality.'"[165] Another has suggested that the extension of the Griswold privacy rights to single people "signaled a new understanding of marriage in the background of constitutional rights. It's the individual who has the rights, not the couple, not the status entity."[166] Of interest is the dissent of one judge in a case which upheld the constitutionality of Virginia's criminal sodomy statute.[167] He wrote: "A mature individual's choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest."[168]

As observed earlier in this memorandum (page 8), the phrase "on account of sex" should not be construed other than as referring to gender. However, the developing constitutional "right of privacy", considered in light of ever-shifting mores and societal permissiveness, opens the door to a more liberal construction. The phrase "on account of sex" has obvious interpretational latitude.

C. Tax-Exempt Status of Church Organizations

There are two ways in which ERA could adversely affect the tax-exempt status of churches and their institutions and organizations. First, ERA could be used to support an extension of the reasoning in Bob Jones University v. United States [169] to deny tax-exempt status under section 501(c)(3) of the Internal Revenue Code ("Code")[170] to organizations that discriminate "on account of sex." Second, ERA could be interpreted as independently prohibiting the government from providing tax benefits to organizations that discriminate on the basis of sex. The first is a matter of statutory construction, the second of constitutional construction.

1. Section 501(c)(3)

In Bob Jones, the Supreme Court held that a private educational institution which followed racially discriminatory policies based on religious beliefs was not charitable within the meaning of section 501(c)(3) of the Code. Noting that such exemptions are justified on the basis that an exempt entity confers a public benefit,[171] the Court concluded that the racially discriminatory schools (i) violated the fundamental public policy against racial discrimination in education, and therefore (ii) could not be deemed to confer a benefit on the public.[172] In the Court's view, education immersed in racial discrimination is robbed of its charitable character. The Court also concluded that the government's fundamental policy against racial discrimination in education, and its interest in denying its support to discriminatory schools, substantially outweigh any burden which denial of tax-exempt status might impose on the institution's rights under the Free Exercise Clause of the First Amendment.[173] The Court noted that the financial impact on the schools would not prevent them from observing their religious tenets.[174]

Perhaps significantly, the Court pointedly observed that it was dealing with a religious school, not with churches or other purely religious institutions, and that the governmental interest was in denying public support to racial discrimination in education.[175] Confined to its facts, the immediate impact of Bob Jones is limited to racially discriminatory educational institutions.

(a) The Church Itself - Clergy

Under the Bob Jones rationale, it could be argued that a church which limits its clergy to men violates ERA's fundamental national policy against discrimination on account of sex, thereby negating any benefits the church might otherwise confer on the public. If the argument succeeded, forfeiture of tax-exempt status would result - at least until the allegedly discriminatory practice is terminated.

The Bob Jones decision was founded on the government's compelling interest in eliminating racial discrimination in education. In matters involving the internal affairs of churches or religious doctrine, the government has no legitimate interest. It is well established that religious freedom under the First Amendment encompasses the right of religious bodies to decide matters of church governance and of faith and doctrine, free from state interference.[176] Freedom to select clergy has been afforded federal constitutional protection.[177] Denial of tax-exempt status to churches, because of the manner in which they select clergy, would raise important constitutional questions, requiring a balancing of the religious freedom protected by the First Amendment with the policy against sex discrimination declared in ERA.

A limitation on religious liberty can be justified by showing that it is essential to accomplish an overriding governmental interest.[178] There is no question that the loss of tax exemption would place a substantial burden on the free exercise of religion by churches or religious orders. But such a burden was allowed in *Bob Jones*. The Courts have sustained burdens on free exercise rights in other contexts when an overriding government interest required. Under ERA, it would be arguable that the Free Exercise Clause does not require an exception for churches or religious orders from a general requirement that tax exemption be denied to organizations that discriminate on the basis of sex. In the area of race discrimination, at least twice the Court has stated that the Constitution tolerates but will not support private discrimination.[179] Under ERA, *Bob Jones* and earlier cases [180] could be used to support a contention that tax benefits should be denied to churches that discriminate on the basis of sex, even for religious reasons.

(b) Sex Distinctions in Educational Institutions

Catholic schools which differentiate on the basis of sex in admissions or activities could very well be the target of efforts to extend the *Bob Jones* reasoning beyond racial discrimination to sex discrimination.

The passage of ERA would surely bolster the argument that single-sex private schools, or private schools that otherwise differentiate on the basis of sex (*e.g.*, in the level of extracurricular activities offered), violate fundamental public policy, one of the two critical elements in the *Bob Jones* rationale. The other, *i.e.* that such schools should not be deemed to confer a public benefit, might also be supported by ERA. It could be argued that sexually discriminatory schools exert a pervasive influence over the entire educational process, outweighing any public benefit that they might otherwise provide.[181] Thus, under the reasoning of *Bob Jones*, the tax-exempt status of such schools may well be jeopardized.

Seminaries and novitiates differ from other Catholic schools, and the schools in *Bob Jones*, in that their primary function is the education and training of priests and members of religious orders. Thus, the *Bob Jones* reasoning seems less relevant. However, as with churches, it could be argued that seminaries and novitiates that differentiate on the basis of sex are not entitled to tax exemption under section 501(c)(3) because they violate the fundamental public policy of ERA.

(c) Other Church Organizations - *e.g.*, Hospitals and Social Welfare Agencies

Whether the *Bob Jones* reasoning could logically be extended to discrimination in charitable areas other than education[182] presents another difficult question. Organizations that perform public service functions (*e.g.*, hospitals and social welfare agencies) are similar to educational institutions in their broad public purpose. If they discriminate on the basis of sex (*e.g.*, by refusing to perform or fund abortions), they could be said to violate fundamental public policy thereby meeting the first criterion of *Bob Jones*. As in *Bob Jones*, it could also be argued that their practices undermine whatever benefits they confer on the public. Thus, ERA could extend the *Bob Jones* reasoning to charitable organizations other than educational institutions. As previously noted for the other categories, it is questionable whether these organizations could successfully raise free exercise defenses in the event of denial of tax exemption.

2. ERA as an Independent Source for Denial of Tax-Exempt Status

The previous discussion focused on the effect of ERA on the interpretation of section 501(c)(3) of the Code. The issue here is whether ERA would operate *independently* to prevent the government from extending tax exemption to organizations that discriminate on the basis of sex. Neither the legislative history of ERA nor relevant case law provide definitive guidance on this point. By analogy to equal protection principles, there are two theories upon which it could be argued that ERA prohibits the grant of tax exemptions to discriminatory organizations, namely (i) through the application of the "state action" doctrine, and (ii) through the adoption of a standard under ERA which prohibits the government from aiding discriminatory institutions.

(a) State Action

Current state action principles developed under the Fourteenth Amendment (discussed above at pages 9 and 10) require some nexus between the government and the discriminatory practice of a private organization before the latter will be treated as state action. The Supreme Court recently held that the grant of substantial funds to a private school did not so involve a state government in the internal decisions of that school as to warrant treating those decisions as state action.[183] Despite some earlier lower court decisions to the contrary,[184] under current state action principles it is not likely that the discriminatory acts of a private organization would be considered state action merely because that organization receives a governmental benefit in the form of a tax exemption, unless there is also significant governmental involvement in the discriminatory acts themselves.

(b) Aid To Discriminatory Institutions

Arguably, ERA could be interpreted as prohibiting governmental programs which have the practical effect of providing aid to discriminatory institutions.[185] There is precedent in the equal protection area to support this contention.[186] In *Bob Jones*, however, the Court did not reach an analogous question, *i.e.* whether denial of tax-exempt status to racially discriminatory schools is independently required by the equal protection component of the Fifth Amendment.[187] Thus, until the Court finally resolves the issue, equal protection precedents provide no definitive guidance as to how ERA would independently affect tax exemption.

Because of the potentially devastating impact that loss of tax exemption could have on churches and their institutions, clarity is sorely needed on this issue. *Bob Jones* demonstrates clearly that free exercise rights can be *burdened* in the area of race discrimination.

D. Government Aid Programs - Participation of Church Organizations

Churches and their related organizations participate in numerous federal and state aid programs involving substantial funds. Programs of particular importance include education, health and social services. In the absence of statutory prohibitions against sex discrimination in aid programs, would ERA independently preclude participation by organizations which differentiate on the basis of sex (*e.g.*, *hospitals*, in relation to abortion procedures; *schools* whose admission policies or programs differentiate between the sexes; and *church agencies* which exclude women from its ministry)? The answer to that question is governed by considerations already discussed in the area of tax exemption.

As already indicated, mere receipt of governmental benefits would not establish the necessary nexus with the discriminatory acts of the private organization for state action purposes.[188]

It is more likely that ERA could be interpreted as prohibiting governmental programs from providing aid to institutions that discriminate on the basis of sex. A similar result was reached in an earlier racial discrimination case under the Equal Protection Clause.[189] Only recently a lower court concluded that the federal government could not, consistent with the equal protection guarantees, provide funding to state agencies which engaged in racially discriminatory practices.[190] By analogy, a similar result could be expected under ERA. As with tax exemption, the result could be the same even where an organization discriminates for religious reasons.

E. Statutory Antidiscrimination Provisions - Exceptions Based on Religious Belief

Questions have been raised concerning the potential impact of ERA on religiously-based statutory exceptions to antidiscrimination provisions.[191] For example, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs receiving federal financial assistance.[192] However, Title IX does not apply to an institution which is controlled by a religious organization if compliance would contravene its religious tenets.[193] Further, the Church Amendment[194] allows hospitals participating in certain federal programs not to perform abortions or sterilizations, and Title VII of the Civil Rights Act of 1964,[195] which prohibits sex discrimination in employment, does not require an employer to pay for health insurance benefits for most abortions.[196]

In assessing the impact of ERA on these exceptions, a fundamental principle must be kept in mind, i.e. neither Congress nor a state can enact a law that denies a right guaranteed by the Constitution.[197] The Court has recently held that an exception in Title IX for the admissions policies of certain single-sex public undergraduate institutions did not exempt a public nursing school from its obligation under the Equal Protection Clause of the Fourteenth Amendment not to deny males the right to enroll.[198] Thus, for example, if ERA were interpreted as prohibiting government funding of organizations that discriminate on the basis of sex for any reason, an exception such as the religious tenet exception in Title IX would probably be invalidated.

VIII. CONCLUSION

To be sure, the present state of the law proscribing sex discrimination reflects contemporary enlightenment and growth. Further, there is no indication that there is not more progress to come. On the other hand, there is also no assurance that the necessary progress will be attained with the dispatch it deserves. Essentially an overlay upon the equal protection components of the Fifth and Fourteenth Amendments, ERA would fortify the existing equal protection guarantees vis a vis sex-based discrimination.

It cannot be gainsaid, however, that ERA is also burdened by potential collateral effects which are probably unintended by many supporters, and which may justifiably be regarded by many as undesirable, and even alarming. It is not possible to forecast all its effects with reasonable precision, a reality wrought in part by the dynamics involved in the complex interplay between ERA and other principles of law which will govern the judicial interpretive process. However, for all the reasons discussed in this memorandum, in the present state of the law and ERA's legislative history, there is no reasonable doubt of its uncertain and far-reaching adverse implications. As for the legislative history, it is a particular cause for regret that the debate too often reflects a desire to imbue the ERA with a purposeful ambiguity, and a willingness to abdicate legislative responsibility in favor of the judiciary.

In the absence of clarifying amendments,199/ or the less secure means of clarifying legislative history, it is fair to say that ratification of ERA would set in motion a potent constitutional force, with potentially undesirable as well as desirable results, whose meaning and effect would be as much a product of skillful advocacy and judicial predilections as of the will of the people. This is a matter of profound constitutional concern. A due regard for our national repository of the powers of government and the rights of the people demands precision both of purpose and expression. It is true, of course, that it is not possible to draft an ERA in a way which makes its future application entirely predictable. Every contingency cannot be envisaged. On the other hand, it is possible to draft an ERA which, illumined by a well-focused legislative history, will avoid major pitfalls which are now readily identifiable. Unlike statutes which are always subject to amendment by the legislature when deficiencies appear, if ERA is ratified its course and effect will be in the hands of the judicial branch.

There is no concern which cannot be resolved, at least substantially, while still preserving the integrity of the economic and kindred goals which women seek to achieve and to which their dignity entitles them. I would counsel constructive endeavors to achieve greater clarity in service to those goals. Because the legal analysis related to these issues is so complex, and often open to honest differences of informed opinion, the effective level of resolution is that of consensus on policy and draftsmanship - not legal disputation. If there is disagreement on the policy to be established, that should be straightforwardly addressed. If there is not, good faith will find a way to express the policy in reasonably clear and effective terms, buttressed by meaningful legislative history.

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General Counsel

FOOTNOTES

1. H.R.J. Res. 1, 98th Cong., 1st Sess. (1983). S.J. Res. 10, 98th Cong., 1st Sess. (1983).

2. S. Rep. No. 92-689, 92d Cong., 2d Sess. 2 (1972). Professor Thomas I. Emerson, a recognized expert on ERA, testified in 1971 that the "basic premise of the equal rights amendment is that sex should not be a factor in determining the legal rights of women, or of men." *Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (April 2, 1971).

3. Senator Hatfield explained: "There is little debate about the general intent of the proposed amendment. Essentially, it requires that the Federal Government and all State and local governments treat each person, male and female, as an individual. It applies only to governmental action; it does not affect private action or the purely private social relationships between men and women. By eliminating gender-based classifications in the law which specifically deny equality of rights, every Federal or State law which makes a discriminatory distinction would be invalid under the equal rights amendment." 129 Cong. Rec. S535 (daily ed. January 26, 1983).

4. *See* Equal Pay Act of 1963, 29 U.S.C. §206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*; Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

5. *See* 129 *Cong. Rec.*, *supra* note 3 (statement of Senator Cranston in support of ERA).

6. *Hearings on S.J. Res. 10 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (May 26, 1983) (statement of Senator Paul E. Tsongas).

7. 2A Sutherland Stat. Const., §§45.13, 45.[illegible] (4th ed. 1972).

8. Dillon v. Gloss, 256 U.S. 368, 373 (1921).

9. Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 n. 29 (1978).

10. Train v. Colorado PIRG, 426 U.S. 1, 10 (1976), *rev'g* 507 F.2d 743, 746-747 (10th Cir. 1974).

11. 2A Sutherland, *supra* note 7, §48.02 at 186.

12. Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 26 (1977); United States v. Public Utilities Commission of California, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

13. *See* 2A Sutherland, *supra* note 7, §48.06.

14. *Id.* at §§48.08, 48.13, 48.18.

15. Ernst and Ernst v. Hochfelder, 425 U.S. 185, 203 n. 24 (1976).

16. Chrysler Corp. v. Brown, 441 U.S. 281, 312 (1979).

17. United States v. Bornstein, 423 U.S. 303, 310 (1976). This task is, in other words, an application of the rule that a reviewing court is to give effect to the plain meaning of the statute as best evidence of the legislative intent. United States v. Fisher, 2 Cranch (6 U.S.) 358 (1805). *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979). Where words have an ordinary or settled meaning, the reviewing court must infer that Congress intended those meanings unless some other evidence in the statute or its legislative history indicates otherwise. NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981).

18. Blanchette v. Connecticut General Insurance Corp., 419 U.S. 102, 134 (1974). *See also* United States v. An Article of Drug, 394 U.S. 784, 799 (1969).

19. *See* Diamond v. Chakrabarty, 447 U.S. 303 (1980).

20. *See* Peyton v. Rowe, 391 U.S. 54 (1968); Stewart v. Kahn, 78 U.S. 493 (1870).

21. In Re Castioni, [1891] 1 Q.B. 147, 167 (Stephen, J.), quoted in 1A Sutherland, *supra* note 7, at 421, quoting Driedger, *Legislative Drafting*, 27 Can. B. Rev. 291-317 (1949).

22. 1A Sutherland, *supra* note 7, at 479, quoting Conrad, *New Ways to Write Laws*, 56 Yale L.J. 458 (1947).

23. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

24. Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982).

25. Kirchberg v. Feenstra, 450 U.S. 455 (1981).

26. Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980).

27. Stanton v. Stanton, 421 U.S. 7 (1975).

28. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

29. Frontiero v. Richardson, 411 U.S. 677 (1973).

30. Reed v. Reed, 404 U.S. 71 (1971).

31. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

32. *Colorado*: "Equality of rights under the law shall not be denied or abridged by the State of Colorado or any of its political subdivisions on account of sex." Colo. Const., Art. II, §29 (1972); *Hawaii*: "Equality of rights under the law shall not be denied or abridged by the state on account of sex." Hawaii Const., Art. 1, §21 (1972); *Maryland*: "Equality of rights under the law shall not be abridged or denied because of sex." Md. Const. Decl. Rgts., Art. 46 (1972); *Massachusetts*: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Mass. Const., Part 1, Art. 1 (1976); *New Hampshire*: "Equality of rights under the law shall not be denied or abridged by this State on account of race, creed, color, sex or national origin." N.H. Const., Part I, Art. 2 (1974); *Pennsylvania*: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Pa. Const., Art. I, §28 (1971); *Texas*: "Equality of the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Tx. Const., Art. I, §3a (1972); *Washington*: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Wash. Const., Art. XXXI, §1 (1972).

33. *See* Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977); Commonwealth v. Butler, 458 Pa. 289, 328 A.2d 851 (1974); Darrin v. Gould, 85 Wash.2d 859, 540 P.2d 882 (1975).

34. *E.g.*, Seattle v. Buchanan, 90 Wash.2d 584, 584 P.2d 918 (1978).

35. Fischer v. Dept. of Public Welfare, No. 283 C.D. 1981, slip op. at 14-16 (Pa. Commw. Ct. Sept. 20, 1984), *appeal docketed*, No. 67-MD-1984 (Pa. Oct. 3, 1984).

36. *See* People v. Green, 183 Colo. 25, 514 P.2d 769 (1973) (mandating "closest" judicial scrutiny); Commonwealth v. King, 372 N.E.2d 196 (Mass. 1977).

37. People v. Salinas, 191 Colo. 171, 551 P.2d 703 (1976).

38. *E.g.*, Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978).

39. State v. Rivera, 62 Haw. 120, 612 P.2d 526 (1980).

40. Mercer v. Bd. of Trustees, North Forest I.S.D., 538 S.W.2d 201 (Tx. Civ. App. 1976).

41. Finley v. State, 527 S.W.2d 553 (Tx. Cr. App. 1976).

42. *See* Buckner v. Buckner, 415 A.2d 871 (N.H. 1980).

43. 42 U.S.C. §2000-2(a)(1): "It shall be an unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin...."

44. *See* General Electric v. Gilbert, 429 U.S. 125 (1977). Title VII was amended in 1978 to overturn the *Gilbert* decision. 20 U.S.C. §2000e(k); *see* [1978] *U.S. Code* Cong. & Admin. News 4749.

45. A similar pregnancy-based exclusion in a state disability compensation program was held not to constitute sex discrimination violative of the Equal Protection Clause of the Fourteenth Amendment. The court found no risk from which men were protected and women were not, and vice versa. Geduldig v. Aiello, 417 U.S. 484 (1974).

46. Title 28 U.S.C. §1343(3) places in the federal courts actions "(1) To redress the deprivation ... of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for *equal rights* of citizens .... [emphasis added]." Title 28 U.S.C. §1443 authorizes the removal to federal court of an action:

    (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the *equal civil rights* of citizens, or of the United States, or of all persons within the jurisdiction thereof;

    (2) For any act under color of authority derived from any law providing for *equal rights*, or for refusing to do any act on the ground that it would be inconsistent with such law. [emphasis added].

47. *See Chapman*, *supra* note 17. *See also* Georgia v. Rachel, 384 U.S. 780 (1966); Blue v. Craig, 505 F.2d 830 (4th Cir. 1974); McGuide v. Amrein, 101 F. Supp. 414 (D.Md. 1951).

48. Black's Law Dictionary defines "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female." *Black's Law Dictionary* (5th ed.) at 1233.

49. *Senator Hatfield*: "By eliminating gender-based classifications in the law which specifically deny equality of rights, every Federal or State law which makes a discriminatory distinction would be invalid under the equal rights amendment." *Senator Specter*: "It will stand as a statement of our belief as a country that discrimination based on the immutable fact of a person's gender will not be allowed." *Senator Tsongas*: "ERA is necessary because thousands of Federal, State, and local statutes - by law - treat American citizens differently depending upon their sex." *Senator Sarbanes*: "The ERA is based on the fundamental proposition that sex should not be a factor in determining the legal rights of women or of men ...." *Senator Cranston*: "It would give constitutional force to the basic principle that government at all levels should treat women and men as individuals having equal rights under the law." 129 *Cong. Rec.*, *supra* note 3, at S535, S536, S529, S537, S538.

50. *Id*. at S535.

51. S. Rep. No. 92-689, *supra* note 2, at 47, citing testimony by Prof. Paul Freund of Harvard Law School and Prof. James White of the University of Michigan Law School.

52. *See* O. Hatch, *The Equal Rights Amendment, Myths and Realities*, at 51-55 (1983); Bevilacqua, *The ERA In Debate - What Can It Mean for Church Law?*, 24 Cath. Law. 101, 127-129 (1979).

53. *Hearings on S.J. Res. 10 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (May 23 and June 22, 1984) (statements by Prof. Raymond Marcin of Catholic University Law School, Prof. Eugene Hickok, Jr., of Dickinson College and Center for the Study of the Constitution, and Prof. Lynn Wardle of Bringham Young University Law School).

54. *See* Grossman v. Board of Education, 11 F.E.P. Cases 1196 (D.N.J. 1975), *aff'd*, 538 F.2d 319 (3d Cir.), *cert. denied*, 429 U.S. 897 (1976); Sommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982) (transsexualism); Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (homosexuality); Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1098 (N.D.Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978) (effeminate behavior in male job applicant); Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977) (trans-

sexualism); Voyles v. Ralph K. Davies Medical Center, 403 F. Supp. 456 (N.D.Cal.), *aff'd*, 570 F.2d 354 (9th Cir. 1975) (transsexualism).

55. Powell v. Reads, 436 F. Supp. 369, 371 (D.Md. 1977) (male employee living as woman as prerequisite to sex-change operation). Judicial interpretations of the term "sex" as "gender" were based in part upon subsequent legislative history involving numerous unsuccessful attempts to amend Title VII to include a specific provision covering discrimination on the basis of "sexual preference." *See* *Sommers*, *supra* note 54, at 750.

56. *But see* *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), where the court held that the constitutional right of privacy did not include the right to engage in homosexual conduct and upheld the U.S. Navy's discharge of an individual for engaging in homosexual conduct.

57. *Webster's Third New International Dictionary* (unabridged) (1976).

58. *See*, *e.g.*, *Personnel Administrator*, *supra* note 23, at 279.

59. Washington v. Davis, 426 U.S. 229, 240 (1976) (employment test that had disparate impact on minorities upheld).

60. *Personnel Administrator*, *supra* note 23.

61. *Hearings on H.R.J. Res. 1 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (October 19 and November 3, 1983) (testimony of Professors Thomas I. Emerson and Ann E. Freedman).

62. *See* Norwood v. Harrison, 413 U.S. 455 (1973), and cases cited therein. *Norwood* has not been overruled by the Court.

63. National Black Police Ass'n, Inc. v. Velde, 712 F.2d 569 (D.C. Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2180 (1984).

64. The Supreme Court has indicated there is an equivalent equal protection component implicit in the Fifth Amendment, which limits the federal government. *See* Regan v Taxation With Representation, 461 U.S. 540, 103 S.Ct. 1997, 1999 n.2 (1983).

65. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

66. *Id.*

67. *Id.* at 1005.

68. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

69. Gilmore v. City of Montgomery, Alabama, 417 U.S. 556, 574 (1975).

70. *See* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982); Adickes v. S.H. Kress Co., 398 U.S. 144 (1970).

71. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

72. Shelley v. Kraemer, 334 U.S. 1 (1948).

73. *Rendell-Baker*, *supra* note 68.

74. Those six Amendments which have an enforcement provision similar to the ERA are the Thirteenth, Fifteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments. *See* S.Rep. 92-689, *supra* note 2, at 20. The only difference in the enforcement provision of the latter amendments is the placement of the clause "by appropriate legislation" at the end, rather than in the middle, of the section. We can see no intended textual difference in the placement of the clause. In either location it modifies the infinitive "to enforce" and answers the question "how."

75. 28 U.S.C. §2201; 42 U.S.C. §1983. There is neither a private right nor a statutory right to seek damages under the Civil Rights Act. Lyle v. Village of Golden Valley, 310 F. Supp. 852 (D. Minn. 1970).

76. Strauder v. West Virginia, 100 U.S. 303, 307 (1880). *But see* Ex Parte Virginia, 100 U.S. 339, 347 (1880) (Fourteenth Amendment to secure "equal rights to all persons").

77. *E.g.*, Caban v. Mohammed, 441 U.S. 380 (1979).

78. *E.g.*, Lyon v. Temple University, 543 F. Supp. 1372, 1378 (E.D. Pa. 1982); Walker v. Hall, 399 F. Supp. 1304, 1306 (W.D. Ok. 1975) (three-judge court), *rev'd on other grounds sub nom.*, Craig v. Boren, 430 U.S. 190 (1977). Although 42 U.S.C. §1983 provides a cause of action for sex discrimination, by contrast, 42 U.S.C. §1981, by its own terms, is limited to racial discrimination and may not be used to challenge alleged sex discrimination. Runyon v. McCrary, 427 U.S. 160, 167 (1976).

79. Maine v. Thiboutot, 448 U.S. 1, 4, 6-8 (1980) (Social Security Act violations within scope of 42 U.S.C. §1983 action). The Court expressly rejected an argument that Civil Rights Act lawsuits are limited to civil rights and equal protection laws.

80. Even where a statute did not, in so many words, provide a remedy, a court could infer a remedy under the statute if one would be consistent with the apparent intent of the Congress. For example, in *Cabell v. Markham*, 326 U.S. 404 (1945), the Court allowed recovery of a debt for seizure of property in World War II under a statute limited to debts existing in World War I. *See also* McGhee v. United States, 154 F.2d 101, 105 (2d Cir. 1946) (Hand, J.). Thus, one commentator has remarked that judges do not necessarily feel bound by rigid form when they believe justice dictates a particular end. Conrad, *New Ways of Writing Laws*, 56 Yale L.J. 458 (1947), quoted in 1A Sutherland, *supra* note 7, at 467.

81. *See* Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1966); *Strauder*, *supra* note 76, at 306-7. The enforcement power under Amendments is like the power the Congress enjoys under the Constitution - to make laws "necessary and proper" to the articulated powers. Any law reasonably related to those purposes will be upheld. *Katzenbach*, *supra*.

82. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

83. *Katzenbach*, *supra* note 81, at 648-49, 651 n. 10. *See*, *e.g.*, Arritt v. Grissel, 567 F.2d 1267 (4th Cir. 1977), Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). More importantly, for purposes of our analysis, the enforcement provision does not allow the Congress to "restrict or abrogate or dilute" any of the rights guaranteed by the substantive provisions but only to protect or extend that substance by any means "necessary and proper." *See* *Katzenbach*, *supra* note 81, at 651 n. 10.

84. *Strauder*, *supra* note 76, at 307.

85. Whether a private right of action would be inferred in any given instance would depend on a weighing of four factors: Whether 1) the statute was enacted for the special benefit of a class which included the plaintiff, 2) the legislature intended to create a private right as evidenced in the legislative history, 3) the existence of a private right of action would be consistent with legislative policy, and 4) a private right would be

inappropriate because of overriding State concerns. *Cort v. Ash*, 422 U.S. 66 (1975). In later cases, the Court has focused heavily on Congress' intent as the key element of the analysis. Middlesex Cty. Sewerage Auth. v. Nat. Sea Clammers Ass'n, 453 U.S. 1, 13 (1981).

86. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the legislation in question was Title IX of the Education Amendments of 1972. 20 U.S.C. §1681.

87. S. Rep. No. 92-689, *supra* note 2, at 20-21.

88. B. Brown, A. Freedman, H. Katz, A. Price, *Women's Rights and the Law - The Impact of the ERA on State Laws*, 37-38 (1977).

89. A. *Congressional Reports, Testimony and Hearings*: S. Rep. No. 92-689, supra note 2; H. Rep. 92-359, 92d Cong., 1st Sess. (1971); *Hearings on H.R.J. Res. 35 before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971); *Hearings on S.J. Res. 10 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong.* - testimony of: Lynn D. Wardle, Brigham Young University (June 22, 1984), Raymond B. Marcin, Catholic University of America (May 23, 1984), Judith Welch Wegner, University of North Carolina (April 23, 1984), Gary L. McDowell, Tulane University (February 21, 1984), Ann E. Freedman, Rutgers University (January 24, 1984), John J. Noonan, Jr., University of California at Berkeley (January 24, 1984), Senator Bob Packwood, Oregon, (November 1, 1983), Eliot Cohen, Harvard University (November 1, 1983), Antonia Handler Chayes, Law Firm of Csaplar and Bok (November 1, 1983), and Jeremy A. Rabkin, Cornell University (September 13, 1983), Donna E. Schlala, Hunter College of the City University of New York (September 13, 1983), Senator Paul Tsongas, Massachussetts (May 26, 1983); *Hearings on H.R.J. Res. 1 before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 98th Cong.* - testimony of: Ann E. Freedman, Rutgers University (November 3, 1983), Jules B. Gerard, Washington University (St. Louis) (October 19, 1983), Henry C. Karlson, Indiana University (October 20, 1983); Diana Pearce, Center For National Policy Review, Catholic University of America (September 14, 1983), Francine Blau, University of Illinois (September 14, 1983), Dr. Bernice Sandler, Association of Women (September 14, 1983), Tish Sommers, Older Women's League of Oakland, California (September 14, 1983), Polly Madlenwald, National Federation of Business and Professional Women

(September 14, 1983), Eunice Cole, American Nurses Association (September 14, 1983), Mary H. Futrell, National Education Association (September 14, 1983), Mary Purcell, American Association of University Women (September 14, 1983), Judy Goldsmith, National Organization for Women (September 14, 1983), Dorothy Ridings, League of Women Voters (September 14, 1983), Kathy Wilson, National Women's Political Caucus (September 14, 1983), Governor Richard Lamm, Colorado (July 13, 1983), Grover Rees, University of Texas (July 13, 1983), Mary Frances Berry, U. S. Commission on Civil Rights (July 13, 1983).

B. *Books and Pamphlets*: B. Brown, A. Freedman, H. Katz, A. Price, *Women's Rights and the Law - The Impact of the ERA on State Laws* (1977); R. Eisler, *The Equal Rights Amendment* (1978); L. Goldstein, *The Constitutional Rights of Women*, *Cases in Law and Social Change* (1975); O. Hatch, *The Equal Rights Amendment, Myths and Realities* (1983); L. Kanowitz, *Equal Rights: The Male Stake* (1981); H. Kay, *Sex-Based Discrimination*, *Text, Cases and Materials* (2d ed. 1981); R. Lee, *A Lawyer Looks at the Equal Rights Amendment* (1980); P. Schlafly, *The Power of the Positive Woman* (1977). U. S. Commission on Civil Rights, *The Equal Rights Amendment: Guaranteeing Equal Rights For Women Under The Constitution* (1981); U. S. Commission on Civil Rights, *Statement on the Equal Rights Amendment* (1978); G. Whittenberg, *The ERA and You* (1975);

C. *Articles and Commentary*: Bevilacqua, *The ERA in Debate - What Can It Mean for Church Law?*; 24 Cath. Law 101 (1979); Brown, Emerson, Falk and Feedman, *The Equal Rights Amendment*: *A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871 (1971); Dow, *Sexual Equality, the ERA and the Court - A Tale of Two Failures*, 13 N. Mex. L. Rev. 53 (1983); Emerson and Lifton, *Should the ERA Be Ratified?* 55 Conn. B.J. 227 (1981); Erickson, *Equality Between the Sexes in the 1980's*, 28 Clev. St. L. Rev. 591 (1979); Ginsburg, *Ratification of ERA*, 57 Texas L. Rev. 919 (1979); Strong, *Contribution of ERA to Constitutional Exegesis*, 14 Ga. L. Rev. 389 (1980); Note, *ERA - The Task Ahead*, 6 Hastings Const. L. Q. 637 (1979); Note, *Congressional Intent and ERA*, 40 Ohio St. L. J. 637 (1979); Note, *Constitutional Law - Sex Discrimination under the Equal Rights Amendment*, 54 Wash. L. Rev. 709 (1979).

90. *See* *Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 208-33; Civil Rights

Comm'n, *The Equal Rights Amendment*, *supra* note 89, at 6-7; S. Rep. No. 92-689, *supra* note 2, at 14-15.

91. *See* *Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 160-176; Civil Rights Comm'n, *The Equal Rights Amendment*, *supra* note 89, at 9-14.

92. *See* Statement of Ann E. Freedman, Associate Professor of Law, Rutgers Law School, before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 12-13 (November 3, 1983); Civil Rights Comm'n, *The Equal Rights Amendment*, *supra* note 89, at 15-16.

93. *See* S. Rep. No. 92-689, *supra* note 2, at 13-14.

94. *See* Civil Rights Comm'n, *The Equal Rights Amendment*, *supra* note 89, at 8.

95. *See* *Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 294-96; Congressional Caucus for Women's Issues, *Equal Rights Amendment Briefing Paper* (November [illegible], 1983).

96. S. Rep. No. 92-689, *supra* note 2, at 16-17.

97. *Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 304-308.

98. *See* *id.* at 307.

99. *See* *id.* at 83-91; S. Rep. No. 92-689, *supra* note 2, at 16

100. S. Rep. No. 92-689, *supra* note 2, at 17-18.

101. *Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 11-12.

102. *See* Statement of Shirley Sandage, Executive Director of the Older Women's League, on Pension Equity For Women before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor (September 29, 1983).

103. *See* Statement of Freedman, *supra* note 92, at 13; Statement of Jane C. Sherburne, Esq., before the Subcomm. on the Constitution of the Senate Judiciary Comm. (March 20, 1984); *See* Civil Rights Comm'n, *The Equal Rights Amendment*, *supra* note 89, at 14-16.

104. *See* Statement of Freedman, *supra* note 92, at 13; *Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 17-19.

105. See Statement of Freedman, supra note 92, at 13.

106. Id.

107. Pub. L. No. 98-21, §§301-310, 97 Stat. 109-17 (1983). To illustrate, the Amendments provide that illegitimate children would be eligible for benefits based on their mother's earnings as previously had been the case with respect to their father's earnings. The Amendments also extend to men certain benefits that had been limited to women, e.g., aged divorced husbands can now receive benefits based on their former wives' earnings records.

108. Pub. L. No. 98-21, §343, 97 Stat. 136-37 (1983). The report has not yet been submitted to Congress. However, a statement on its status by Martha A. McSteen (Acting Commissioner of Social Security before the Task Force On Social Security and Women of the House Select Comm. on Aging) on April 12, 1984 points out the complexity and difficult policy choices inherent in any substantial revision of the social security system.

109. Id.

110. H.R. 4280 as passed by the Senate on August 6, 1984, by the House on August 9, 1984, and signed into law by the President on August 23, 1984.

111. S. Rep. No. 92-689, supra note 2, at 13-14.

112. Id. at 13.

113. See testimony of Prof. Eliot Cohen, Harvard University, and Antonia Handler Chayes, Esq., before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary (November 1, 1983).

114. S. Rep. No. 92-689, supra note 2, at 13.

115. Id.

116. Brown, et al., The Equal Rights Amendment, supra note 89, at 977.

117. Women are generally excluded from serving in combat units by statute (Navy and Air Force) or as a matter of established policy (Army and Marine Corps). See Rostker v. Goldberg, 453 U.S. 57, 76-78 (1981), and authorities cited therein.

118. Brown, et al., The Equal Rights Amendment, supra note 89, at 889-93. See testimony of Thomas I. Emerson, Lines

Professor of Law Emeritus, Yale Law School, before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm. 7 (October 19, 1983); *Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 14.

119. Some commentators have concluded that existing proscriptions against women serving in combat would be invalid. *See* testimony of Prof. Eliot Cohen and Antonia Handler Chayes before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary (Nov. 1 1983).

120. *Rostker*, *supra* note 117, at 64-65.

121. S. Rep. No. 92-689, *supra* note 2, at 17. *See Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 97-207.

122. *See* R. Lee, *supra*, note 89, at 69.

123. S. Rep. No. 92-689, *supra* note 2, at 17.

124. *See Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 160-76; Civil Rights Comm'n, *The Equal Rights Amendment*, *supra* note 89, at 12-13.

125. *See Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 160-76.

126. *See Id*. at 101.

127. *See Id*. at 102-111.

128. Special rules governing married women's domicile can result in differences in eligibility for resident tuition at state schools, jury duty, voter registration, tax liability, and jurisdiction over estates. *Id*. at 113

129. S. Rep. No. 92-689, *supra* note 2, at 14-15. *See also Women's Rights and the Law - The Impact of the ERA on State Laws*, *supra* note 88, at 209-24; Civil Rights Comm'n, *The Equal Rights Amendment*, *supra* note 89, at 6-7.

130. S. Rep. No. 92-689, *supra* note 2, at 15.

131. 42 U.S.C. $2000e-16(a).

132. 42 U.S.C. $2000e(f).

133. *See* Civil Rights Comm'n, *The Equal Rights Amendment*, *supra* note 89, at 8-9.

134. Roe v. Wade, 410 U.S. 113 (1973).

135. *E.g.*, Jackson v. Kelly, 557 F.2d 735, 740 (10th Cir. 1977).

136. Similarly, ERA proponents have argued that ERA and abortion are unrelated, the former being a matter of economic equity and the latter being a health/privacy issue. Johnson and Cunningham, *E.R.A. and Abortions: Really Separate Issues?* 150 (22) America 432, 437 (June 9, 1984). Yet proponents have resisted all efforts at assuring, by amendment, such separateness. *Id.* at 435, 436, 437.

137. Akron v. Akron Center for Reproductive Health, __ U.S. __, 103 S. Ct. 2481, 2504-05 (O'Connor, J., *dissenting*).

138. *See*, *e.g.*, Lynch v. Donnelly, ____ U.S. ____, 104 S. Ct. 1355 (1984) (First Amendment *Establishment Clause* test); New York v. Quarles, __ U.S. ___, 104 S.Ct. 2626 (1984) (Miranda rule).

139. *Roe*, *supra* note 134, at 153; *see also* Harris v. McRae, 448 U.S. 297, 316 (1980).

140. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

141. *Harris*, *supra* note 139, at 325.

142. *See* Johnson and Cunningham, *America*, *supra* note 136, at 433.

143. *Id.*; *see* *Roe*, *supra* note 134, at 153.

144. *Harris*, *supra* note 139.

145. *Id.*

146. *Roe*, *supra* note 134, at 163.

147. *Harris*, *supra* note 139, at 325. The Supreme Court in *Harris* concluded the abortion funding restriction was discrimination based not on "sex" but on "indigency." The Court reaffirmed that "indigency" is not a "suspect classification." *Id.* at 323. When the Court in *Geduldig*, *supra* note 45, at 497 n. 20, rejected an argument that a classification based on pregnancy in a state disability compensation format was sex discrimination and found instead it was based on medical condition, the dissent charged that the Court was backing away from its decisions applying greater scrutiny to gender-related classifications. On another occasion, one of the *Geduldig* majority explained that the absence of an ERA was an important

reason the Court decided not to apply "strict scrutiny" to such classifications. *See Frontiero*, *supra* note 29, at 692. (Powell, J., concurring).

148. *Fischer*, *supra* note 35.

149. *See*, *e.g.*, Adams v. Howerton, 486 F.Supp. 1119 (C.D. Ca. 1980), *aff'd*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972) (restricting marriage to couples of opposite sex was not irrational or invidious discrimination violative of the Equal Protection Clause). The appeal in *Baker* was dismissed for want of substantial federal question, which operates as a decision on the merits. *See* Carpenters Pension Trust v. Kronschnabel, 632 F.2d 745, 747 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981); Anonymous v. Anonymous, 325 N.Y.S. 2d 499 (1971). *See generally*, Rivera, *Our Straightlaced Judges: The Legal Position of Homosexual Persons in the United States*, 30 Hastings L.J. 799 (1979).

150. Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973).

151. DeSanto v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984).

152. Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

153. The text of the Washington ERA is "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." Wash. Const., Art. XXXI, §1 (1972).

154. *Singer*, *supra* note 152, at 1195.

155. *Adams*, *supra* note 149, at 1124.

156. 388 U.S. 1 (1967).

157. *Id.* at 11.

158. Even if the strict gender discrimination argument were rejected, it can be argued that discriminatory treatment of sexual minorities constitutes discrimination based on sexual stereotype, which is itself a form of sex discrimination. *See Salinas*, *supra* note 37, 551 P.2d at 706, which interpreted the Colorado ERA as follows: "This amendment prohibits unequal treatment based exclusively on the circumstance of sex, *social stereotypes connected with gender*, and culturally induced dissimilarities." [emphasis added].

159. *See* *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 72-86 (1970) (testimony of Prof. Paul Freund of Harvard Law School).

160. *Baker*, *supra* note 149, at 187.

161. *Singer*, *supra* note 152, 522 P.2d at 1191. *See generally*, *Black's Law Dictionary*, *supra* note 48, at 876.

162. Marcin, *supra* note 53.

163. Hickok, *supra* note 53.

164. 381 U.S. 479 (1965).

165. *See* Richards, *Sexual Autonomy and the Right to Privacy*, 30 Hastings L. J. 957, 981 (1970). Further, Prof. Richards suggests that "...in the contraception and abortion decisions, the Court impliedly rejected the legitimacy of both the classic Augustinian view of human sexuality and the associated judgments about the exclusive morality of marital procreational sex. The enforcement of majoritarian prejudices, without any plausible empirical basis, could be independently unconstitutional as a violation of due process rationality in legislation." *Id*. at 982.

166. Marcin, *supra* note 53.

167. Doe v. Commonwealth's Attorney for City of Richmond, 403 F.Supp. 1199 (E.D. Va. 1975) (three-judge court), *aff'd*, 425 U.S. 901 (1976).

168. *Id*., 403 F. Supp. at 1203 (Merhige, J., dissenting).

169. Bob Jones University v. United States, 461 U.S. 574, 103 S. Ct. 2017 (1983).

170. IRC §501(c)(3), 26 U.S.C. §501(c)(3) (1983).

171. *Bob Jones*, *supra* note 169, 103 S.Ct. at 2028.

172. *Id.* at 2031 n. 21.

173. *Id.* at 2035.

174. *Id.*

175. *Id.* at 2035 n. 29.

176. *See* Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-22 (1976).

177. *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929).

178. United States v. Lee, 455 U.S. 252, 257-58 (1982). The Free Exercise Clause of the First Amendment can require exceptions from laws of general applicability, unless such exceptions would unduly interfere with a compelling state interest. *Id*; Thomas v. Review Board of Indiana Employment Security Division 450 U.S. 707 (1981). However, as was the case in *Lee*, where an employer was required to pay into the social security system, despite his religious beliefs to the contrary, the court has upheld limitations on religious liberty in order to accomplish an overriding govermental interest. *Id*. at 260.

179. *Norwood*, *supra* note 62, at 470; *Runyon*, *supra* note 78, at 175.

180. *Id*.

181. *Bob Jones*, *supra* note 169, 103 S.Ct. at 2031, 2035 n. 29.

182. The Court in *Bob Jones* declined to decide whether other kinds of charitable organizations could also be denied exempt status if they violated public policy. *Id.* at 2031, n. 21.

183. *Rendell-Baker*, *supra* note 68.

184. *See* Falkenstein v. Dept. of Revenue, 350 F. Supp. 887 (D. Ore. 1972), *appeal dismissed*, 409 U.S. 1099 (1973); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Pitts v. Dept. of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971).

185. Maryland's ERA has recently been interpreted by a trial court as prohibiting a property tax exemption for a country club which limits its membership to males. Bainum v. State of Maryland, Equity No. 85397 (Cir. Ct. Montgomery County Sept. 13, 1984).

186. *See* *Norwood*, *supra* note 62, and *Moton v. Lambert*, 508 F. Supp. 367 (N.D. Miss. 1981), where standing was found in an equal protection challenge to a state tax exemption as applied to private racially discriminatory institutions.

187. *Bob Jones*, *supra* note 169, at 2032 n. 24.

188. *Rendell-Baker*, *supra* note 68.

189. *See* *Norwood*, *supra* note 62.

190. *National Black Police Ass'n, Inc.*, *supra* note 63.

191. *Hearings on S.J. Res. 10 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong. 2d Sess.* (Jan. 24, 1984) (Testimony of John T. Noonan, University of California). *Hearings on S.J. Res. 10 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess.* (Sept. 23, 1983) (Testimony of Jeremy A. Rabkin, Cornell University).

192. 20 U.S.C. §1681(a).

193. 20 U.S.C. §1681(a)(3). This exception provides protection for Catholic educational institutions which, for religious reasons, decline to include abortion coverage in health benefit programs that arguably could fall within the reach of the Title IX regulations. 34 CFR §106.40(b)(1) & (4).

194. 42 U.S.C. §300a-7.

195. Religious organizations are exempted from Title VII only with respect to preferences for individuals of a particular *religion* for the performance of work connected with the carrying on of its activities. 42 U.S.C. §2000e-1. Religious organizations are fully subject to Title VII with respect to other types of discrimination criteria (race, color, sex, or national origin). E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982).

196. 42 U.S.C. §2000e(k). The exception in Title VII was adopted to prevent compromise of the religious freedom of employers having religious or moral objections to abortion. H. Rep. No. 95-948, 95th Cong., 2d Sess. 7 (1978), *reprinted in* [1978] U.S. Code Cong. & Admin. News 4749. Unfortunately, it is not broad enough. It requires employers to include in their employee health insurance benefits coverage for abortions necessary to prevent endangerment to the mother's life if the fetus were carried to term, and, by implication, coverage for disability stemming from abortions in their disability insurance benefits and sick leave plans. *See* Nat'l Conference of Catholic Bishops v. Bell, 490 F. Supp. 734 (D.D.C. 1980), *aff'd*, 653 F.2d 535 (D.C. Cir. 1981).

197. *Mississippi University For Women*, *supra* note 24, at 732-33.

198. *Id.*

199. Congressman Sensenbrenner has sponsored an amendment to ERA which would add: "[n]othing in this article shall be construed to grant or secure any right to abortion or the funding thereof." The Sensenbrenner proposal would, if

approved, avoid the undesirable linkage of ERA and abortion. The amendatory process, however, requires this caveat. It is possible that the defeat of rejecting the Sensenbrenner amendment could be construed by a court as establishing the intent that ERA *is* to support abortion and abortion funding. Such a construction by a court would not necessarily be on solid ground because Congress and legislators could reject amendments on any number of grounds including convenience. *See* 2A *Sutherland*, *supra* note 7, at 224. One must consult the legislative record, however, to determine whether rejection of an amendment established definitive legislative intent. *See* Automobile Trade Association of Maryland v. Insurance Commissioner, 292 Md. 15, 437 A.2d 199 (1981); City of Ingleside v. Johnson, 537 S.W.2d 145 (Tex. Civ. App. 1976). If so, then that intent would be very helpful to a reviewing court and possibly harmful to the cause to overturn *Roe v. Wade*, *supra* note 134.

SUMMARY OF THE REPORT BY THE CALIFORNIA COMMISSION ON STATUS OF WOMEN

(1975)

A National Study of the Societal Impact on Conformance of laws to the ERA

Assumptions Underlying the Project

1. Widespread sex discrimination exists which is reinforced by our laws.

2. ERA will set forth with unequivocal clarity the principle that equality of rights under the law shall not be denied or abridged on account of sex.

3. The legal changes mandated will have a broad societal impact on marriage, family, government, education and commerce.

Need for a Constitutional Amendment

In interpretations of the 14th Amendment's Equal Protection Clause, (nor shall any State deny to any person within its jurisdiction the equal protection of the laws) the Supreme Court has applied at least two tests -- minimum or reasonable scrutiny versus strict scrutiny.

- Minimum or reasonable scrutiny

In most cases, the Equal Protection Clause requires that the legislature have a "reasonable" basis for the classification it uses under a statute. Under "minimum scrutiny" the Court will uphold an act if the tests are met: (1) the act is a valid one; and (2) the classification made -- or the persons to which the act applies "are reasonably related to the purpose for which the act applies."

The first requirement is almost unavoidably met because State governments and legislatures have broad police powers. The second requirement will be met if the court can find any rational basis of the classifications made.

- Test for"Suspect Classifications or Fundamental Interests"

States must demonstrate that (1) it had a "compelling state interest" for passing the law; (2) the classification of persons to whom the law applies was necessary to accomplish the State's "extremely important" or "compelling" purpose.

The U.S. Supreme Court has never held sex to be a "suspect classification". The closest it came was in the case of Frontiero v. Richardson where the Court struck down an Air Force regulation requiring husbands of female Air Force officers to prove that they were in fact dependent on the wives for support before gaining dependency benefits while automatically giving all wives of male Air Force officers the same benefit. Four or the nine Justices declared their belief that sex was a suspect classification. Cases since then have applied "minimum scrutiny" test to sex classifications.

Standard Of Review Under the ERA

Clearly the ERA would require at least (emphasis added) a standard of strict scrutiny in reviewing statutes which make sex-based classifications. However, if the Court looks at legislative history and the Yale Law Review article, it will apply a standard higher than strict scrutiy -- one of absolute prohibitions of sex based classification.

Yale Law Journal - "It follows the constitutional mandate must be absolute. The issue under ERA cannot be different but equal, reasonable or unreasonable classifications, suspect classification, fundamental interest or the demands of administrative expediency. Equality of rights means that sex is not a factor.... 80 Yale Law Journal 871 at 892.

The Yale Law Journal article is part of the legislative history. It was placed in the Congressional Record by Senator Birch Bayh. Distributed to House Members by Congresswoman Martha Giffiths, Senator Ervin, the leading opponent stated the article was "primary legislative history.

It seems likely that the absolute standard will be adopted.

State Actions Concept of ERA

The Fourteenth Amendment only applies to "State action". The Equal Protection clause does not apply to private discrimination. It only applies to actions of state governments through statutes or officials, or by private entities which are "significantly involved" with the State that their actions are tantamount to actions by the State.

ERA will only apply to action by the State or private institutions who are so intertwined with the State that they can be said as acting for the government.

Major test for state action is "significant state involvement". Factors looked to include: state regulation of the institution in question; tax exemption, funding, or other state involvement which enhances the ability of the private entity to operate and therefore discriminate.

Statutes which are neutral on their face but discriminatory in impact.

Examples of unconstitutional laws or actions:

1. High Schools maintenance of only one team in each sport fielded by the school.

2. Criminal penalties for non-payment of child support. Applies 95 percent to men and as such must be strictly scrutinized.

Right of Privacy Qualification to the Amendment

Right of privacy would protect personal bodily functions; such as sleeping, showering, and disrobing without intrusion by members of opposite sex.

Laws Relating to "Unique Physical Characteristics" Found Only In One Sex

Absolute Standard of ERA is also qualified by "unique physical characteristics" principle must be strictly scrutinized, i.e. laws which apply to pregnant women.

QUESTIONS UNDER ADOPTION OF ERA - CALIFORNIA COMMISSION

1. Criminal Law

Jury Selection Laws (p.950).

Jury members tend to favor members of their own sex. Thus laws favoring men over women for various reasons would be discriminatory (effect on family). A 1975 Supreme Court case of Taylor v. Lonsanon held that states cannot constitutionally require all men to serve on juries while allowing women to take the affirmative step of signing up on a jury list if they wanted to. Urge adoption of a completely voluntary jury system. Or require all persons to sign up for jury service subject to being excused by a judge.

Sentencing Statutes

Issue of fixed minimum and maximum terms for men which also give a judge discretion to reduce the maximum term imposed versus "indeterminate"sentences for women which remove the judge's discretion as to minimum and maximum terms. This is discriminatory because parole is applied for after serving one-third of minimum sentence. Indeterminate sentencing contains no minimum. Women may spend longer time in prison. (In practice, this is not the case) or women may apply for parole earlier than men. Some case law on this issue have held that indeterminate sentences are violations of the 14th Amendment's Equal Protection clause. Any sentencing statute which makes sex-based distinctions would be unconstitutional under ERA. Solution. Appellate review of criminal sentence.

Criminal Sentence

Sentencing practices. There is a "chivalry" factor in American penal system. Ratio of males to females arrested is 6-1. Males to females actually incarcerated is 21-1. Possible solution: greater uses of half-way houses, work release, probation would equalize sentences. Also appellate review of sentencing decisions would equalize sentence practices.

Parole.

In 1970, there were 34 men imprisoned for every woman. Despite no statistics, there is a real possibility that women are treated more leniently than men. Solution: Open parole hearings to prisoners and give applicants for parole the right to be represented by attorneys at the hearings. By having the records, it will be possible to determine if parole standards are applied in a discriminatory manner.

Conditions of Parole which might violate ERA

Because of sex double standards:

(1) not living with members of opposite sex

(2) "determination of fitness" to recover custody of children placed in a foster home while parolee is in prison.

Solution: There are no statistics to back up the above assertions. State and federal government should keep records of the reason for revocation of parole and note the sex of the parolee.

Jurisdictional Statutes for Juvenile Courts

All state statutes pertaining to juveniles should contain no differential age limits for boys and girls.

Standards of Misconduct for which Juveniles are Incarcerated

Many states contain statutes allowing judges to send juveniles to reform school for "willful disobedience" or similar conduct. Studies show boys have been held to stricter standards. Also girls are more likely to be committed to reform school than boys for sexual activity.

Solution: Limiting conduct for which any juvenile male or female could be committed to a reformatory to behavior that is criminal. Eliminate CHINS (Children in Need of Supervision) category in juvenile law.

Length of Terms to which Boys and Girls are sentenced

Judge can set longer reform terms for conduct than criminal sentencing provisons would. Girls argue that reformatories are not better than prisons and that a longer sentence, regardless of where served violates ERA. Boys argue they are denied equality when sentenced to prison instead of reformatories because of rehabilitation aspects of reform school.

Solution: Sentence boys and girls equally to prisons or reformatories.

Standards for Parole from Reformatories

80% of girls incarcerated in reformatories were for non-criminal conduct. 18% of boys were incarcerated for non-criminal conduct.

Girls' average stay in reformatories was 10.1 months as compared with 8.2 months for boys. Why paternalistic attitude toward girls.

Solution: Fixed or shorter term for either boys or girls commitment to reformatories.

Girls and Boys Reformatory Conditions

Girls criticize the type of training. Girls are trained in cooking, cleaning, sewing. Boys are trained in woodwork and vocational skills. Boys had less privacy and were kept in large dorms. Girls are given "very small private rooms. ERA will require integration except for sleeping, showering and dressing quarters.

Sex Discriminatory Aspects of Adult Penal Institution

35 of 50 adult penal institutions have completely separate prisons. "Separate, but equal prisons" will not be tolerated under ERA, because ERA applies to prisons. Role of the Privacy qualification? Do guards have to be of same sex? Will prisons have to be updated when integrated or may women be placed in less comfortable surroundings? Question #1: recognize the right of privacy, question #2. public areas guarded by persons of either sex. Question #3 could be conflict of ERA with 8th Amendment.

Isolation of Women Prisoners from Families

Eight States have no women prisons. Send them to other states and pay on per capita basis. Sex integration of prisons required by ERA will correct this isolation. After adoption of ERA, state could adopt a sex neutral status on admissions taking into account conduct, educations, interests, and seriousness of crime. However, 80% of women prisoners are mothers. Such statute which does not take this into account might be discriminatory.

Solution: States could fashion a sex-neutral rule allowing prisoners of either sex who were sole parents or guardians to choose the basis on which then admission to prison would be made.

Vocational Rehabilitation Opportunities

Current sex separations in prisons carries with it segregation of vocational rehabilitation programs.

Solution: Physical integration of men's and women's prisons. However, opening up mechanics and welding programs to women is not enough. Must recognize current jobs preferred by women. (Seems to be double standard operating here).

Educational and Work Release Programs

Because the population of women in a number of states is small, prison administrators are reluctant to sexually integrate prisons. Women prisoners are denied academic programs available to men. This is in violation of ERA.

Solution: Physical integration of men's and women's prisons.

Homes Farms and Halfway Houses

Problem is same as in the previous Education and Work Release Program.

Solution: Same.

Recreational Facilities, Programs and Sports

ERA will require similar range of physical recreation facilities be made available to women and men despite the small size of female prison population.

Solution: Physical integration of men and women prison facilities. But still be careful of rule that is neutral on its face but discriminatory in impact. (intent v. effect test)

Prisoners Dress

Currently in most prisons males wear uniforms, females do not. ERA will require they be treated equal.

Visitors and Visiting Hours

Problem. Many prisons allow females shorter hours for visits than male prisoners, and some do not allow children to visit female inmates, despite the fact that 80% of female prisoners are mothers. This will be violative of ERA.

Solution: Choices - make sure any rule applies equally to male and female prisoners - does not answer, however, cause. Rule could be neutral on fact, but affect 80% of women adversely with regards to children.

Medical Services and Religious Services

Because of small population of women prisons, women do not have same kind of full time doctors or chaplains or regular services.

Solution: Physical integration of prisons.

Abortion Rights of Female Prisoners

No study has been made since Roe decision of the practice of state prisons with regard to furnishing women prisoners the same right to abortion guaranteed to other female citizens. This practic violates the Roe and Doe decisions. No reference to ERA. It does state that women must be told of of the prison's duty to pay for abortions as it would pay for any other needed medical care which includes delivery.

Failure to Classify Women on Seriousness of the Offense

Due to small number of women prisoners, women in prison are rarely if ever classified. It is routine with males.

Solution: Integrate prisons under ERA.

Isolation of Women in County Jails

One half of women on any one day are incarcerated in jail. This amounts to two women in every county jail.

Solution: The only solution consonant with the amendment, the women's right to privacy, her right to be held in the locale of crime, and right not to be in solitary confinement without good cause is to give women in a county jail a choice of jails.

Sex Discrimination of Mental Institutionalization of Women

Problem: State statutes providing for civil commitment to State mental institutions are all written in vague broad terms granting too much discretion to psychiatrists. "Expressly basing the civil commitment of women to mental institutions on the professional opinions of persons whose training has encouraged sex-bias and sex-biased thinking may violate the ERA.

Solution: None really - "intellectual awareness by all attorneys who represent women in civil commitment hearings.

Treatment in State Mental Institutions

Peformance of lobodomies - three times as many women receive lobodomies as men in mental institutions.

Solution: (1) Court approval of lobodomies in advance, attorney to be appointed to represent patient, (2) Establish a lay and medical board to approve performance of lobodomies.

Punishment for Sexual Behavior

Problem: Application of double standard - traditional sex-role stereotypes. Male sex desires normal, femal sex desires "sexually acting out." ERA makes this illegal.

Solution: Conduct a detailed study of ways in which stereotypes affect inmates.

Sex Discriminatory Aspects of State Laws relating to Sexual Assault

Traditional Definitions - problem is with definition of rape.

Solution: Entire body of criminal law dealing with sex assault of forceable rape needs to be reviewed.

Corroboration Requirement for Rape.

Elements usually required to be corroborated: (1) identity of defendant, (2) fact of penetration, (3) use of force to accomplish act of penetration.

Do not discuss corroboration in view of ERA.

Penalty of Rape

Sixteen States have death penalty. Also have more severe penalties for rape than other kinds of assault.

Solution: Penalty for Rape must be lowered to the penalties imposed for other physical assault.

Impossibility of Rape Between Married Persons

In Israel, the highest court ruled unconstitutional a similar rule. The Court said the marriage contract could not change the right of any person to choose not to consent to sex. Probability such complaint by law unconstitutionally discriminated against married women.

Possible solution: Don't really give a solution.

Judicial Instructions in Rape Cases

"I charge such [illegible] made against the plaintiff in this case is one which is easily made and once made difficult to defend against, ever."

Sex Discriminatory Aspects of State Statutes and City Ordinances dealing with Prostitution

There is a growing movement to decriminalize prostitution. A model prostitution ordinance used by localities which conforms to the ERA.

Statutes which punish only prostitution By females

These statutes will be unconstitutional under ERA.

Solution: Extend coverage to males.

Unequal Enforcement of Prostitution Statutes which punish Male and Female Prostitutes Equally

Argue that most sex-neutral prostitution statutes are enforced almost exclusively against female prostitutes. This constitutes state action which will be prohibited by ERA.

Solution: Police Departments must make sure that the approximate ratio of the percent of arrests and prosecution for prostitutes of both sexes be similar.

Statutes which do not punish patrons or punish them less severely

Because the majority of prostitutes in the United States are women and the majority of patrons of prostitutes are men, state statutes which punish only prostitutes and not their patron are unconstitutional because discriminatory in impact.

Miscellaneous Criminal Statutes Which Violate the ERA

1. Seduction statute
2. Retribution
3. Adultery where defined as only as "intercourse with another man's wife"
4. Sodomy where only applies to male.

EDUCATION - CHAPTER 3

Introduction. Most farreaching, longterm effects of ERA will be on education.

Educational Institutions to which ERA will apply

ERA, like the 4th Amendment applies to all State and federal agencies thus public schools are covered. Also private education institutions whose activities are found by courts to come within the concept of State action. (Not clear which private institution the State action doctrine will encompass under the ERA).

Solution:

1. A series of state restriction cases under Powe v. Miles 294 F.Supp. 1269, modified 407 F.2d 73, held that no matter how large or what amount of federal or state funding it receives has yet been held to the requirement of the 14th Amendment.

2. ERA may render private sex discrimination educational institutions ineligible for government subsidies, tax exempt status or financial assistance (Bob Jones University case).

3. Congress should also expand Title IX.

Admissions Policies

Single Sex Schools

Many public educational institutions are completely sex segregated.

In the Pearl case if genuinely separate and equal sex-segregated schools, it would seem that if the ERA is interpreted in education as the 14th Amendment was in Brown, single sex schools would not be permissible. ERA should be interpreted to require the physical integration of all single-sex schools operated by entities subject to ERA.

Rate of Integration of Single Sex Schools

Two years after the ratification of ERA hundreds or thousands of single sex schools will be in effect.

Solution: Brown v. Board held that all public schools must racially integrate "with all deliberate speed" (seems to imply court action). Advise Congress to make statutory standards to speed up integration.

Standards of Admission to Sex-Integrated Schools

Should have a statute which requires sex-neutral admission standards in every state.

Veterans Preferences

Such statutes, because there are more women than men, are neutral on their face but discriminatory in impact.

Solution: (1) Eliminate Veterans Preferences

(2) Extend Veteran Preference to spouse

Athletic Programs

Under current law and ERA where no women team exists in a particular sport women must be allowed to compete equally with men on a single school sponsored integrated team.

Solution: (1) Regardless of ERA's application in other areas, an exception should be made in athletics which would allow separate men's and women's teams to be established.

(2) Sex-neutral teams should be established with the qualifications for each established only by athletes' ability.

(3) Sex-neutral qualifications such as height and weight limits, with rules permitting individuals to compete above their level if skillful enough should be established.

Participation of Women in Contact Sports

ERA will require that women be allowed to play on school teams in "contact" sports which include football, baseball, basketball and hockey.

Solution: In sports that have been dangerous ones impose safety rules which allow smaller persons to participate safely in that sport. This would work to change the rules of some of these sports.

Integration of Athletic Departments and Facilities

Question of whether separate men's and women's athletic departments can be maintained after ERA.

ERA would require integration of men's and women's athletic departments. But give schools reasonable time to comply.

EQUALIZATION OF BUDGETS

ERA would require roughly equal expenditures of State and public funds for men's and women's athletics.

- Schools should be given reasonable time to comply.

Academic Courses

Admission to many courses in public schools is restricted by sex. Shop, home economics, physical education, ROTC, vocational education, sex education and courses in women studies. ERA would require that all public schools and other schools subject to the amendment open all courses to all students without regard to sex.

Extra-Curricular Single Sex Clubs and Organizations

Talking about Key Clubs and other organizations sponsored by such groups as Kiwanis, Little League, 4-H, fraternities and sororities.

Have to determine if State action exists, but also should be cognizant of First Amendment right to freedom of association.

However, most of these issues will have to be litigated.

"It may be safely said that when no State funding is received, school facilities are not at all or not extensively used, and the school is not involved in the actual activities of organizations, sex-restricted private organizations will probably not be held to conform to the ERA.

Right of Sex-restricted Private Groupe to use School or State facilities

A constitutional question arises because although the State itself will be barred by the ERA, the amendment would be a nullity if private sex-restricted groups are allowed exclusive or primary use of facilities that a state owns. To what extent, if any, may sex-restricted groups make use of state facilities for meetings, games, or other private activites? It is possible that principles of Title IX which prohibit use of State facilities by sex segregated groups, except fraternities and sororities would be applied under the ERA.

Physical Facilities in Public Schools

Since Yale Law Journal article, seperate but equal has no place in interpreting ERA. Rather the constitutional principle which has come to be accepted as a qualification of absolute equal rights is right or privacy. Seperate facilities are o.k. as long as comparable either dealing with domrs and locker rooms.

Student Conduct

ERA will invalidate all sex-discriminatory school rules which provide different standards for men and women living on campus, lengths of hair and hours, etc.

Expulsion of pregnant women students

Currently many school districts have rules which require pregnant students to quit. These rules will unquestionable violate the ERA. There is no valid state objective served by a law that only relates to sex. Pregnancy has no relationship to attending school despite the fact that it is a "unqiue physical characteristic."

Faculty

ERA may create a new remedy for faculty members. This remedy will be independent of Title VII. 42 U.S.C. 1983 would dove-tail with ERA. Is not staute of limitation under Section 1983 as there is with Title VII. A suit brought under 42 U.S.C. 1983 could be pursuded concurrently with a Title VII action.

State Administration of Sex-Restricted Private Scholarships

May State schools accept and administer privately established scholarships which are restricted by their terms to benefit only one sex?

ERA should be interpreted as prohibiting the administration of all private sex-restricted scholarship by State institutions. "Benign" discrimination has no place in the interpretation of ERA.

Affirmative Action in Education

1. More day care centers.
2. Longer hours to finish law schools cause care for children.

FAMILY LAWS

ERA will require that states reexamine marital property laws which determine ownership of the earnings and property of both spouses acquired by other during marriage.

ERA will generate imaginative solutions to problems many women face almost alone.

Those who oppose ERA are not aware that millions of women are shouldering the entire economic burden as well as the overwhelming physical and psychological burdens of raising children from a former marriage with little or no help from their ex-husbands. ERA will offer a great improvement in the lives of many women.

Marriage Contract - Rights and Duties

How should the present concept of the rights and duties assumed upon marriage be reformed after ERA?

1. Parties to any marriage should be free to contract between themselves duties and rights of each partner - housekeeping, child-raising, work outside the hime, etc.

2. Rights and duties assumed upon marriage should continue to be those imposed by the State as altered and equalized by laws passed after ratification of ERA.

Duty of Child and Spousal Support

Problem: At common law, in many states, the state-imposed duties of marriage differ according to the sex of spouse. Husband duty of supporting wife and child. Wife - render household and wifely services with liability to support husband and children if husband cannot or will not. These laws will be overturned by the ERA.

Solution:

Extend duty to support to both spouses equally. Support can be contributed in a variety of ways. However, this duty is troublesome not in itself but in its application because it is unenforceable excep upon divorce or separation.

As to non-criminal support laws, ERA will require that they be imposed equally on wives as well as husbands.

Most important agrrement of duty to support which must be considered if ERA passes is the "economic dependency which both present support laws and a simply "equalized" support statute forced upon a person who performs uncompensated domestic labor for many years.

Compensation for household labor must be considered.

Solution: Community propoerty system or massive change in local security system to give workers in the home a share in the local security system.

Problem of Civil Enforcement of Support Right in the Ongoing Family

Currently courts refuse to interfere in a marriage relationship to enforce a husband's duty imposed by the State upon marriage to support his wife and children.

ERA will require both husband and wife support of each other. Problem of enforcement will still exist.

Second problem after ERA on enforcement is that while a wage-earning spouse might be ordered to pay money, the uncompensated spouse doing household labor cannot be ordered to perform services in return for monetary support.

Legal Rights and Duties in Putative and Common-Law Marriages

Many States do not recognize common law marriages.

In a society where majority of women do not work outside the home, a rule of state law which does not recognize common law marriage will deny the wives important benefits including right to property accrued by the "husband" during the marraige.

Such laws possibly violate ERA because it is neutral on its face but discriminatory in impact.

Sex Discrimination Aspects of the Legal Effects of Marriage

Rights of Consortium

As of 1978, in 31 states, a husband could sue for loss of consortium while a wife could not. This would violate the ERA.

Wife's name and domicile after marriage

Statutes such as voter registration laws, drivers license laws, laws which exclude married women from the class of those who may equally change their names, and laws which provide that a wife may resume her maiden name upon divorce, which assume that upon marriage may or must take her husband's surname.

Under ERA such statute will be unconstitutional.

Solutions: Enact statute which simply affirms right of married persons to retain their birth names or use any other legal names they choose, or require, in the interest of identification of married couples and their children that married persons use the same surname, combination thereof or entirely different name.

Dcomicile of Married Women

Under current (in majority of States) law, the legal domicile of a woman is that of her husband.

Under ERA any rule of law which establishes domicile by reference to any individual sex will be unconstitutional.

Solution:

Passage of statutes which positively allow married persons to establish separate somiciles or by repealing other statute. If married persons establish seperate domiciles they will become liable to different states for different duties and be eligible for different benefits which accrue according to domicile.

Childrens Names and Domicile

If married peroans are allowed by state law to use different names a question may arise as to what names would be taken by children born to parents with different names.

Solution: Only legislative solution is to allow parents to determine the name or names the children will have.

Domicile of Children

Current law makes the legal domicile of a child born to married parents that of the father and of a child born to unmarried persons that of the mother. ERA would make unconstitutional both of these provisions.

Because courts have believed children are incapable of forming the required intent to be domiciled in one place, the current law establishes rules as to the domicile of "unemancipated" children which applies regardless of intent.

Possible Solution:

Domicile of child is where child actually resides for the major part of the years or have a statutory age when a child is presumed to be incapable of forming requisite intent to establish a domicile.

Legal Right to Marry

Age at which men and women may marry

It will be unconstitutional under ERA to have different ages at which men and women may marry without consent.

Solution: Have them be the same age.

Homosexual Marriages

In all jurisdictions, marriage by persons of the same sex is prohibited. Yale Law Journal article and opponents of ERA claim that ERA would legalize homosexual marriages.

Solution: Amendment would probably not allow homosexual marriage. Legislative history - Senator Bayh's remarks state as such. Also, State of Washington interpreted its ERA statute not to sanction homosexual marriages.

Legal Rights of Unwed Parents

Should have consent of both father and mother under ERA before a child is put up for adoption. U.S. Supreme Court has already expanded the constitutional rights of natural fathers of children born out of wedlock. Court has determined that a natural father was denied due process where his child was given for adoption by the mother alone.

Sex Discriminatory Aspects of Grounds of Divorce

Examples: Two sex-discriminatory grounds are common today which would be outlawed by the ERA: (1) pregnancy at time of marriage by another man, (2) non-support of a wife by her husband.

Solution: Repeal of sex-discriminatory grounds and substitution of no fault grounds or extend grounds for divorce to both men and women.

Sex Discriminatory Aspects of Laws relating to the Division of Property re divorce, child support and alimony.

Commission notes that in 42% of all cases, husbands default entirely on child support in the first year. By the 10th year, 20% are still paying.

A conclusion is made that American women brought up to believe that marriage and children were the ultimate achievements in life and whose career ambitions were either stunted or non-existent too often find themselves divorced, unable to collect child support and working in a job market where there is employment discrimination.

"It is in the area of property division in divorce, child support and alimony that ERA can have a great effect. The law must be seen as an instrument capable of causing and aiding social change.

Division of Property in Divorce

Widespread belief that alimony is a burden imposed on husbands and unfairly extracted by grasping wives.

Discussion centers around SEction 307 of the Uniform Marriage and Divorce Act. No statements are made as to how ERA would affect this important aspect of family law.

Child Support - Problems of Enforcement

No statements made as to how ERA would affect Act. Could assume that former wives would be responsible for child support. Talk about repeated law suits for support arrearages.

Alimony

Several aspects of the alimony laws would be unconstitutional under ERA: (1) Some states awarded only to wives and payable only by husbands, (2) Awards of alimony in some instances based on concept of fault. To the extent that alimony serves as compensation for the years many wives spent out of the labor force performing uncompensated domestic work, construction of the "fault" concept in alimony or maintenance awards will deprive wives of what is in effect "back pay" for work already performed and arguably will be unconstitutional under ERA. (3) Ceases upon wife's remarriage - #2 applies.

Solutions:

A. make it applicable to former husabdns also

B. Adopt Section 307 and 308 of the Uniform Marriage and Divorce Act prohibiting "fault" from being taken into account.

C. Adopt provisions regarding wife's or husband's remarriage that is based on uncompensated service that alimony will not be discontinued upon remarriage.

Sex Discrimination Aspects of Laws Relating to Child Custody

Judicial Preference for Mothers in Custody Proceedings.

Giving preference to mothers cause of child's "tender age" will be unconstitutional under ERA.

Solution: Adopt a sex neutral standard for determining custody.

Adultery or Misconduct

Sexual double standard regarding custody cases - less stringent for men more stringent for women. Statute stating "court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."

Custody Rights of Natural Fathers

In Stanley v. Illinois, the U.S. Supreme Court held an unwed father was denied due process where he was not given a hearing before being declared an unfit father. Should be procedural in a statute whereby a father, wishing to obtain custody, can establish parentage.

LABOR LAWS

ERA will affect labor laws in three ways:

1. Will invalidate state protective laws still effective for employers of less than 15 employees not covered by Title VII of the Civil Rights Act of 1964. All employers, regardless of the number of employees, will be placed on an equal footing as to conditions of employment for male and female workers.

2. Reverse the Supreme Court decision in Geduldig v. Aiello which held that state unemployment insurance statutes did not have to provide coverage for preganancy and pregnancy related disabilities.

3. Provide an additional remedy - a suit for damages in federal courts for sex discrimination by state or local governments acting in their capacities as employers.

Extention of "benefits" Provisions in State Labor Laws to cover Men

Problem. Statutes which require that a minimum wage for each hour worked and a premium rate for hours worked over a fixed number of hours per week be paid to women employees.

These provisions have been invalidated by Title VII as to employers covered by the Act. ERA would make them unconstitutional.

Weight Lifting Limits for Women Employees

In order to be constitutional under ERA will have to be closely related to the actual requirements of a job so that they do not serve as barriers which effectively exclude women from jobs for which the requirements imposed are clearly not necessary.

Statutes Providing that Women Cannot Work for Specified periods before and after childbirth

Such statutes have been held uncosntitutional already and would be unconstitutional under ERA. ERA will have broader applications - pregnancy would have to be treated as any other disability.

Exclusion of Pregnancies from Disabilities which are compensated under State Unemployment Insurance

Problem: Supreme Court held that equal protection clause did not prohibit the exclusion of normal pregnancies from the disabilities covered as an unemployment insurance program. ERA should have the effect of reversing that ruling. Insure at the least that strict scrutiny is applied.

State Statutes Which give Veterans Preference in Employment by the State

Because the Armed Forces are overwhelmingly male, such statutes are laws which are "neutral on their face", but discriminatory in "impact" upon women and will be unconstitutional.

Two solutions possible: (1) repeal the statute entirely, (2) include veterans and their spouses.

State Statutes under which benefits are payable to "widows" or dependent widowers

Two Supreme Court decisions. Unconstitutional under the equal protection clause.

Marital Property Law

Will seperate property systems under ERA be unconstitutional after passage of the ERA as laws. Neutral on their face, but discriminatory in impact upon married women?

Arguably, yes.

In the factual setting in which these laws operate, it is men in society who are expected to fulfill role of wage earner. Women remain homebound to care for children - uncompensated by wages. If wife does work it is usually at a lower level than a man and will not advance as rapidly. Argument is that seperate property system cannot operate as neutral, thus would be uncosntitutional under the ERA.

Community property as an alternative to Seperate Property Systems

To make ERA fully effective, every effort should be made to apply a new nationwide community property law to all property owned by married persons whether owned now or acquired after the effective date of the ERA.

If this is not done as soon as possible - if one relies on ERA alone to deconstitutionalize seperate property systems, conversion could take "30 - 40 years." Also, a conversion to community property acquired after the effective date of the change would mean that 43 seperate property jurisdictions would go forward under two systems of seperate property as to that acquired beofre the date of change; and a system of community property as to that acquired afterwards.

Query: Why is such a procedure of converting to community property rights unconstitutional as a taking of a person's property without due process of law? [A somewhat redundant argument is made]. Answer: Conversion would not be a taking. The law in all seperate property states now requires a husband support his wife; many require their property be divided equitably upon divorce. and most give a surviving spouse a share of property of the deceased person. A change in these three aspects might thus only be an affirmation of the rights the wife already has and a restructuring of the property relations in marriage so that the wife could enforce those rights, as she is frequently unable to do today.

Minimal Reform of the Seperate Property System

Dower, Curtesy, and wife's "nonbarrable" or "forces" share.

Dower and curtesey are statutory provisions intended to insure that the surviving spouse will not be left unprovided for. One-third life estate in real property.

"Nonbarrable or forces share" gives the right for wives only outright ownership of a portion of her deceased husband's property.

Solution:

1. Desexed Dower rights - should insure there is a provision to insure consent by both spouses of large gifts made during lifetime as "dower and curtesy" rights are effective only on property owned at time of death.

Elimination of all Forms of Spouse Protection at Death

Three States, North and South Dakota and Georgia give neither spouse with statutory protected rights in other's property at death.

Could be attacked as "neutral on its face but discriminatory in impact" as women will be most hurt by the lack of protection.

The "Necessaries" Doctrine

Applies in 21 States. Merchants may sell to wife articles which are necessary and collect from the husband. No corresponding liability exists for wives.

This will be unconstitutional under ERA.

Solution: Enact "family expense statutes" either spouse is liable for items of family expense.

Tenancy By The Entireties

In existance in 22 States. In 12 of these states, a creditor of one of the spouses alone who has gone to court cannot collect the judgment from the spouses interest in any property held by the spouses as tenants by the entirety until the non-debtor spouse has died, survived by the debtor spouse. If debtor spouse dies first, the creditor cannot collect at all from property which has been held by the spouses in this form of ownership. Because of this, creditors ask both spouses to sign if credit is extended.

These statutes probably harmonious because tenancy by the entirety is only found in seperate property states where a husband is more likely than a wife to have other assets or a large income upon which to obtain credit.

A second problem is that in some states the husband alone has the sole right to manage property held by him and his wife as tenants by the entirety. Some courts have held that all rents from leasing property held in tenancy by the entirety belong to the husband. Both of these rules would be unconstitutional under ERA.

Solution:

1. Abolish Tenancy by Entirety or if that is not possible:

   a. give spouses equal interest in all rents,
   b. provide that both husband and wife have firth to manage property,
   c. make it possibel in all states for creditors to collect debts.

Community Property Systems

There are certain aspects of community property laws that will become unconstitutional after passage of the ERA. These aspects include:

1. Certain community property statutes which prohibit wives from managing the community property in which they have a vested one-half ownership interest. Other statutes also prohibit a wife from managing any portion of community property, except wages.

2. Characterization of debts as either "community debts" or "seperate debts" should be both defined.

3. Debt collection - beyond the characterization problem, Nevada and Louisiana retain unequal provisions for the collection of debts from the property of husband and wives. The entire community is liable for the husband's debts, but none of it is liable for the wives. However, wife's seperate property is not liable for any portion of the community's debts, while the husband's entire property is.

4. Characterization of property as seperate or community when spouses are seperated but not divorced. (should keep property community property, until divorced.)

5. Divivision of community property on divorce courts can equitably distribute community property upon divorce. This may result in unequal shares.

6. Earning capacities developed during marriage should be considered as a property asset which must be valued upon divorce.

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EQUAL RIGHTS AMENDMENT

BRIEFING PAPER

Prepared by Caucus Staff

November 1, 1983

The Congressional Caucus for Women's Issues works to pass legislation to eliminate economic and social discrimination against women. The cornerstone of this goal is passage of H.J.Res. 1, the Equal Rights Amendment.

The Caucus supports H.J.Res. 1 **WITHOUT AMENDMENTS** and considers its passage a top priority in the 98th Congress.

The following fact sheets on the Equal Rights Amendment were prepared by the Caucus in anticipation of House action on H.J.Res. 1. They are based on the Amendment's ten year legislative history as well as recent testimony presented before the House Judiciary Subcommittee on Civil and Constitutional Rights.

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THE EQUAL RIGHTS AMENDMENT: AN OVERVIEW

H.J.Res. 1 resubmits the Equal Rights Amendment to the states for ratification as the 27th amendment to the U.S. Constitution.

The Equal Rights Amendment was first introduced in 1923. It was passed by the 92nd Congress on March 22, 1972, and submitted to the state legislatures for ratification. To become a part of the U.S. Constitution, an amendment must be ratified by three-fourths, or 38, states. The ERA fell three states and a handful of votes short of this goal in 1982.

Below is the full text of the Equal Rights Amendment:

SECTION 1.
Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2.
The Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article.

SECTION 3.
This Amendment shall take effect two years after the date of ratification.

American women need the ERA to secure equal justice under the law. Without such constitutional reform, we remain a nation without the mandate for and basic guarantee of equal rights. Consequently, women have less opportunity, less economic security, and fewer rights under the law than men do.

The Equal Rights Amendment is needed to achieve permanent economic equality for women.

EXISTING LAWS ARE NOT ADEQUATE TO ELIMINATE SEX DISCRIMINATION. A statute-by-statute approach to eliminating sex discrimination, whether at the federal or state level, does not work. Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Equal Pay Act of 1963, and the Equal Credit Act are the laws most often cited as providing equal opportunity for women. However, they are riddled with exemptions and have been unevenly applied by the federal courts. The experiences of the past 20 years have shown that these statutes have not provided adequate enforcement and have not resulted in desired changes in the patterns and practices of discrimination.

CURRENT LAWS CAN BE REPEALED OR WEAKENED AT ANY TIME BY LAWMAKERS. For example, the current Administration has already implemented regulations that weaken Title IX, the law prohibiting discrimination in public education, and has argued in court to severely limit its scope.

ERA WOULD PROMPT STATE, LOCAL, AND FEDERAL GOVERNMENTS TO TAKE THE STEPS NECESSARY TO RID THEIR LAWS, PRACTICES AND POLICIES OF SEX BIAS. Under the ERA, state and federal government will no longer be permitted to disadvantage individuals by means of any law, government policy, or government practice that discriminates on the basis of whether an individual is male or female. In some states that have passed their own ERAs, such as Colorado and Pennsylvania, swift legislative reforms followed and countless discriminatory statutes were struck down.

THE STANDARD DEVELOPED BY THE SUPREME COURT TO JUDGE SEX DISCRIMINATION CASES IS UNCLEAR. The 14th Amendment to the U.S. Constitution, frequently the basis for sex discrimination suits, offers uneven and uncertain protection against sex bias. The 14th Amendment, together with the 13th and 15th Amendments, was added to the Constitution more than a century ago to extend civil rights to black Americans. The legislative history of the 14th Amendment's equal protection provisions provides no guidelines for applying it to sex discrimination claims.

A constitutional amendment is the ONLY insurance that women and girls of all races will have fair and equal opportunities in employment, education, benefit and retirement plans, credit during marriage, divorce, and in old age.

Recent public opinion polls have shown extremely high support for the ERA among the American people. Two-thirds of the country, almost [illegible]%, support the amendment. And support is high in both ratified and unratified states. More than 450 major organizations representing over 50 million Americans have endorsed the ERA.

THE ERA IS A MAINSTREAM POLITICAL ISSUE WHOSE TIME HAS COME.

ERA: STATE EXPERIENCES

Six states have equal rights amendments substantially identical to the proposed federal ERA. These states are Colorado, Maryland, New Hampshire, New Mexico, Pennsylvania, and Washington.

In several states, legislative action prompted by the state ERA eliminated many discriminatory laws and prohibited future enactment of discriminatory gender-based legislation. In those and other states, a combination of legislative, judicial and administrative action has combined to eliminate much discrimination against women.

Colorado Governor Richard D. Lamm best summed up his state's ERA experience in his testimony before the House Judiciary Committee:

> "The cases illustrate the common sense approach which the courts have taken to interpreting the ERA. Judges generally have stayed with familiar legal theories [by employing the strict scrutiny test] to review laws which classify persons on the basis of sex. They have permitted the use of statistics to prove that, although an act is neutral on its face, it has a discriminatory impact. They have recognized that unique physical characteristics may be a compelling reason to uphold sex-based classifications. The courts have refused to play games with the ERA. The judges have always kept in mind the purposes of the ERA and have not permitted the ERA to become a refuge for law breakers or those who seek to penalize women by wrapping themselves in the ERA."

Here are some of the findings under state ERAs:

State courts have recognized the value of the contributions of the homemaker.

Presumption that the husband is owner of household goods possessed and used by both spouses was set aside as incompatible with the Pennsylvania Equal Rights Amendment. DiFlorido v. DiFlorido. 331 A.2d 174 (Pa. Sup. Ct. 1975).

Under the Texas ERA, courts have held that because of the value of the custodial parent's services (in this case, the mother's), a mutual duty of both parents to provide child support does not require equal monetary contributions. Kremp v. Kremp 590 S.W.2d 229 (Tex. Cir. App. 1979).

State ERAs have not mandated that women could be forced to go to work if they wanted to stay home and raise their children.

Under the Pennsylvania ERA, the court found that the divorced mother may not be required to make financial contributions to the child's support because of the value of her custodial services. Wasiolek v. Wasiolek 350 A.2d 400 (Pa. Sup. Ct. 1977).

State ERAs have not mandated abortion funding.

In Massachusetts, state Medicaid restrictions on abortion were challenged under the ERA. The court did not rule on the ERA issue, but rather struck down the restriction on state due process law. Moe v. King, 417 N.E.2nd 387 (Mass. 1980).

In Connecticut, state Medicaid restrictions on abortions were challenged under the state ERA. The court ordered state funding on privacy and other grounds. The ERA claim was not adopted by the court. Doe v. Maher, 8 Family Law Report 2006 (Ct. 1981).

Homosexual marriages have not become legal under state ERAs.

In Washington, a statute prohibiting same-sex marriages was upheld under the ERA. The state asserted that since all homosexual marriages were barred by statute, there was no sex discrimination issue. Male pairs as well as female pairs were denied a license under the law. Singer v. Hara, 11 Wash.App. 247 (1974).

State courts have not allowed state ERAs to be used to protect male criminals.

Relying on the remedial purposes of the ERA and recognizing that the ERA permits different treatment based on the unique physical characteristics of the sexes, the Colorado court upheld convictions for rape, gross sexual imposition, and statutory rape under old sexual assault laws. (The Colorado state legislature rewrote the sexual assault laws in neutral language.) People v. Green (183 Colo. 25, 1973).

In Maryland, the defendant in an appeal from a conviction for rape challenged the constitutionality of the statutory definition of rape as abridging his rights on the basis of sex. The court of special appeals rejected this challenge, finding that because physiologically only males could perpetrate rape, the classification limiting culpability to males was rationally related to the state's purpose of criminal penalty. Brooks v. State (24 Md.App. 384, 1975).

ERA AND THE HOMEMAKER

The ERA will recognize the economic partnership of marriage and will acknowledge the homemaker as an equal contributor to the family.

BACKGROUND

Many laws and practices operate to deprive homemakers of economic security during marriage, upon divorce, or at widowhood, by failing to recognize their valuable contribution to their families and society. The homemaker's contribution is not viewed as economically equal to the breadwinner's.

Most of our marital laws date back to English common law. Married women were considered the property of their husbands, seen as economically dependent upon their spouses, obligated to provide domestic services and companionship. Today, despite progress, many of our tax and divorce laws, the Social Security system, and insurance and pension plans still reflect these archaic assumptions.

Homemakers lack basic legal rights concerning ownership, possession and control of marital property. In many states a married homemaker cannot obtain credit in her own name because it is assumed that only the wage earning spouse controls assets. Some states still follow common law practices that household goods purchased during marriage belong only to the husband unless the wife can show her monetary contribution to the purchase.

Problems resulting from the homemaker's lack of legal and economic protection become acute if the marriage dissolves through divorce or death. Divorced women rarely receive alimony, and often receive no child support. Even when such money is received, it is usually inadequate. Discrepancies between the earnings of men and women exacerbate the problem. The divorced father almost always has more disposable income than the divorced mother who has the children to support.

Under the ERA, laws and court orders relating to domestic relations will be based on the principle that each spouse contributes equally to the marriage. The ERA will afford women a basis in law that entitles them to equal management and ownership of property acquired during the marriage.

QUESTIONS

Q. What effect would the ERA have on alimony and support awards?

A. Under the ERA, gender neutral rules will require monetary and non-monetary contributions from both spouses in accordance with their means.

Q. Would men still have to support their wives under the ERA?

A. Many courts have refused to enforce the support obligations of husbands during marriage because of a reluctance to invade the privacy of marriage. As a result, even if a husband denies his wife money for her most basic needs--food, health care, clothes--she cannot, as long as she continues to live with him, expect a court to order him to provide reasonable expenses. ERA will have little impact on this unfortunate situation. However, in the event the marriage dissolves, the homemaker's non-monetary contributions to the family will receive fair recognition in dividing marital property.

Q. Would the ERA force divorced mothers to work in order to meet her obligation of equal support for the children?

A. No. This issue has been litigated in Pennsylvania under the state ERA. The court recognized the importance of the custodial parent's role in staying home with the children. Defining rights and responsibilities in sex neutral terms means that both breadwinners and homemakers are entitled to legal and economic recognition, not that each must perform both functions.

Sexist assumptions in Social Security work against the homemaker in various ways:

** The unpaid homemaker receives absolutely no disability protection for herself or her family; her survivors receive no benefits. The assumption is that homemakers do not work.

** If divorced before 10 years of marriage, homemakers have no coverage for those years. Since approximately one-third of all marriages dissolve before the 10th year, a significant number of women lose financial security.

** If an employed married woman leaves the paid labor force to care for her family, she is penalized by having zero earnings entered into her savings history and her payouts are reduced.

Q. How would the ERA affect homemakers' Social Security benefits?

A. Social Security provisions harm women because they are premised on sex-based assumptions that fail to recognize the economic value of work in the home, the discriminatory wage structure in the labor force, and the unique work patterns of women as they temporarily drop out of the labor force to raise children. ERA would require the reexamination of sexist assumptions that underlie the Social Security system.

ERA AND WORKING WOMEN

The ERA will strengthen [illegible] prohibitions against sex discrimination in the work place, and require [illegible] enforcement of current laws which outlaw bias in wages, fringe benefits, hiring, [illegible]ces, and other conditions of employment.

BACKGROUND

The increased labor force participation of women is one of the most important labor market trends of this century. 43% of all women are working outside the home today, more than ever before. In 1981, over half of all married women were working, up from 24% in 1950. 48% of women with children under 6, and 63% of women with children between the ages of 6 and 17, were in the labor force.

Growth in the number of single women heading households has been dramatic. Accompanying this trend has been a phenomenon known as the feminization of poverty--more than half of the total number of poor families in this nation are maintained by women. Almost three-quarters of minority children in female-headed households live in poverty. If this trend continues, it is estimated that 100% of the poverty-stricken in the year 2000 will be women and their children.

If wives and female heads of households were paid the wages that similarly qualified men earn, about half of the families now mired in poverty would not be poor.

Discrimination against women in the market place has not been eradicated, despite laws on the books to protect them. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination and the Equal Pay Act of 1963 requires wage equity, but in 1983 women continue to earn only 59% of men's income. These equal employment laws and affirmative action policies are simply inadequate, unevenly applied, and often loosely enforced. And, as with all statutes, they can be repealed or weakened at any time, or simply not be enforced by the agencies charged with that responsibility.

Moreover, even statutes such as Title VII and the Equal Pay Act are inadequate to address one of the most powerful forces against economic equity for women--occupational segregation. Most working women are concentrated in a small number of relatively poorly paid occupations. Studies show that jobs viewed as "women's work" are lower paid simply because they are "women's work," regardless of the skill, responsibility or training required to do them.

A statute-by-statute approach to remedying economic bias does not work. Only a constitutional guarantee of equal employment opportunities for women can get at the root of the problem. Women are in the work force to stay. Limited access to job training, vocational studies, and educational fields will ensure the endurance of the feminization of poverty and the widening of the wage gap.

The ERA would prohibit sex discrimination by public employers, prompt state legislatures to repeal discriminatory laws, and guide the courts when enforcing the laws. So-called "protective legislation" restricting the types of jobs women can hold and the hours they can work would be repealed. Loopholes and exceptions in equal employment laws would be closed.

QUESTIONS

Q. What effect would the ERA have on veterans' preference in public employment?

A. It should be noted, first of all, that public employment has always been an important source of jobs for women. There are currently some veterans' preference schemes so extreme that women have been virtually excluded from the upper levels of state employment, relegated to clerical and support positions, no matter how qualified. Programs to reward our veterans reentering the work force would have to be more narrowly tailored and carefully weighed against the ERA's prohibitions against sex discrimination so as not to unduly limit employment opportunities for women.

Q. How would the ERA affect seniority systems?

A. Genuine nondiscriminatory seniority systems would not be struck down by the ERA. However, in cases where these systems mask actions which exclude women from jobs or job advancement, deny them adequate pay, or make them more likely to be laid off, seniority would be subject to challenge. Every major labor union in the nation supports the ERA.

Q. How would the ERA affect employment and pregnancy?

A. Work policies prohibiting pregnant women from working, laws denying unemployment benefits to pregnant women, and plans revoking accrued seniority and fringe benefits following temporary leaves of absence due to pregnancy have created powerful obstacles to women in the work place. Current law offers protection against some of these practices, but are subject to the threat of repeal and less than aggressive enforcement. The constitutional guarantees of the ERA would ensure that pregnant workers continue to be treated as individuals--sick leave, disability pay, and other health benefits would be granted to them on the same basis as to other disabled workers.

ERA AND EDUCATION

The ERA will require that all publicly supported schools at all levels eliminate practices which discriminate against women. It will not tell schools what to do, but only that whatever they do, they must do fairly.

BACKGROUND

Sex discrimination in education reflects and perpetuates the discrimination women face throughout their adult lives. It begins in grade school with sex stereotyped texts that portray boys as leaders and achievers and girls as followers and watchers, continues through high schools where boys learn to operate machines and girls learn to keep house, and culminates in universities with weighted admissions policies, limited women's athletic programs and courses of study.

No one can deny the importance of education in determining life and employment opportunities. One-half of all women work; two-thirds work out of economic necessity. Yet women's educational preparation for the job market is heavily weighted in favor of low paying, dead-end jobs. In vocational courses, women have been concentrated in home economics, health, office occupations and consumer and homemaking programs, while men have dominated technical, agricultural, trade and industrial programs which lead to higher paying jobs. At a time when our society is moving into an advanced technological era, when math and science training is essential for jobs in high technology and other growing employment fields, 83% of home economics students are female, while 94% of trades and industry students are male.

QUESTIONS

Q. What impact would the ERA have on single-sex public schools?

A. The ERA would mandate that public schools could not continue discriminatory practices -- they would have to integrate.

Q. What impact would the ERA have on single-sex private schools?

A. The impact of the ERA on private educational institutions would depend on the extent of state involvement. A private institution whose sex-segregated policies could not be justified might lose government funds.

However, just as under current law regarding race, the ERA would allow some schools or programs to continue admissions policies and compensatory aid for women if their single-sex nature is evaluated by the courts as making a positive contribution to overcoming the effects of past discrimination and promoting sex equity. A policy designed to provide educational opportunities for women to overcome past discrimination need not be inconsistent with the ERA.

Tax-exempt status alone may not create sufficient state involvement to be affected by the ERA. Under Bob Jones University v. U.S. 103 S.Ct.2017 (1983), it may be permissible to deny tax-exempt status if the institution's practices can be found to offend public policy.

Q. Would sports teams have to be integrated?

A. The ERA would accommodate the maintenance of all-female teams where necessary to guarantee equality of athletic opportunity. But women qualified to play on all-male teams would be allowed to do so.

Q. Would ERA outlaw fraternities, sororities and other private clubs and associations at colleges and universities?

A. Purely private social organizations would not be affected by the ERA. If such organizations were supported with public funds or were so interwoven with the academic life of an institution as to represent official action, the ERA would apply. (See Iron Arrow Honor Society v. Heckler, 51 U.S.L.W. 2649, 11th Cir. 4-11-83.)

Q. Would sleeping facilities and bathrooms have to be integrated?

A. No. The right to privacy is not in conflict with the ERA. Privacy cannot be a subterfuge for providing unequal opportunity, however.

ERA AND RETIREMENT

The ERA will strike overt discriminatory laws from the books and open the door to challenge superficially sex neutral laws that have a discriminatory impact on women.

BACKGROUND

The "pension game" is one that the American woman almost always loses. All women--single, married, divorced or widowed--are shortchanged by a system that has failed to meet their changing needs and to guarantee them economic justice. Most retirement systems, designed to reward the long-term, steady worker with low mobility and high earnings, do not reflect modern work and family patterns, and do not apply to most women.

Today 53% of all women--43% of the total labor force--work for pay. Their unique work patterns stemming from childbearing and rearing responsibilities are not recognized as having economic worth, and hence are not provided for in present retirement systems. In 1980, fewer than 10% of all American two-parent families fit the 1940's stereotype of an employed father, stay-at-home mother and two or more children under 18. Moreover, with the high incidence of divorce and even higher percentage of surviving spouses being female, the presumption that the husband will be present to provide for his wife is no longer realistic.

This presumption of dependency works against all women, especially in the Social Security system. If a husband and wife jointly own a business or farm, benefits accrue in his name. If the wife is disabled, she has no credits on which to seek benefits. Because of the principle of only paying one worker in a couple, a two-earner couple with the same income as a one-earner couple receives lower benefits. In 1979, 2.3 million retired women who paid Social Security taxes were no better off than had they never worked for pay and never contributed to Social Security. The net result is a growing population of elderly, poor women. 85% of the elderly poor are single women; 60% of them depend solely on Social Security for their income. Yet, in 1983 the average Social Security payment for women 65 or older was $4,476, compared to $5,725 for men.

Inequities in pension systems compound the problem. Regulations which ignore women's typical work patterns, such as minimum participation age and vesting requirements, coupled with inadequate provision for survivor benefits, mean that in 1981 only 10% of retirement age women received a pension, compared to 28% of retirement age men. Even if a woman does have a pension based on her own earnings, the average benefit is only 59% of a man's average benefit, reflecting continuation of the wage gap into old age.

Pensions must accommodate today's work patterns and needs of women in order to offer a decent standard of living after retirement.

QUESTIONS

Q. Since most women live longer than most men, isn't it fair to have a different contribution and payout schedule under pension plans?

A. Most older women do not live longer than most men of the same age. In a random sample of 1,000 men and 1,000 women age 65, 86% of men and women matched in death ages. Life expectancy differences between men and women reflect nothing more than group averages applied to individuals. Moreover, a recent National Research Council study has revealed that the overwhelming reason for the difference in life expectancy at birth between men and women is smoking: the life expectancy figures for non-smoking men and non-smoking women were identical. Other factors, more reliable and specific than sex, should be used in annuity and pension calculations.

Q. Won't the elimination of sex-based actuarial tables, now widely used in pension plans, impose a tremendous administrative burden on companies?

A. Under Title VII of the Civil Rights Act, the Supreme Court has already determined that sex-based actuarial tables cannot be used to force women to contribute more to a pension plan for equal benefits (Manhart) or to receive lower benefits for the same contribution (Norris). However, these decisions only affect employer-sponsored pensions plans and many women are not covered by such plans. The ERA is necessary to expand and cement these principles in all pension plans.

Q. Won't it cost millions to equalize pension payouts?

A. The industry estimates that $2 billion will be required to equalize pension payouts. While that seems like a lot of money, it is only three-tenths of 1% of current pension fund assets.

ERA AND INSURANCE

The ERA will prohibit sex-based discrimination in insurance, requiring insurers to set rates and coverage in the same manner for men and women. Sex-based actuarial tables would be disallowed, in favor of a system which uses individual characteristics more closely related to health, life, and casualty expectancies.

BACKGROUND

Despite our national policy prohibiting discrimination on the basis of race, color, origin, religion, and sex, unfair treatment of women seeking insurance coverage remains a major obstacle in the path to economic equity. Insurance companies practice sex discrimination when they limit women's access to certain types of insurance coverage and set rates, terms, and conditions that are unequal for women and men seeking identical coverage.

Adequate insurance coverage for American women and their families is of critical importance. Women comprise 43% of today's work force. They are the primary wage-earners for 7.7 million single-parent families, but their average earnings are only 59% of male wage-earners' incomes. The notion that women do not need insurance coverage is outdated, and yet they continue to receive inequitable treatment in such areas as disability, life, and health insurance.

The use of sex-based actuarial tables by private insurers often results in unequal benefits and limited coverage for women. These insurers justify this practice by tables showing that women live longer than men, on average. As a result, women as a whole have received lower monthly payouts of annuities for which they have contributed identically as their male counterparts.

Most women, however, do not live longer than most men of the same age. 85% of men and women of retirement age die at the same time. This means that the majority of women pay for the longevity of a few in annuity and insurance benefits. Using gender to determine benefits in this way, then, serves merely as a proxy for other characteristics more closely associated with mortality, longevity, and morbidity. Studies have shown that personal habits such as smoking and drinking are more relevant to determing life expectancy, but insurers continue to rely on gender as a substitute for individual characteristics.

Gender-based classifications that inhibit women's economic security are demonstrated in the following areas:

DISABILITY INSURANCE This type of insurance is generally unavailable to women who do not work outside the home, nor to part-time workers, the majority of whom are women. In states which do provide this insurance coverage for women, studies show that women pay more than men with identical or better coverage.

HEALTH INSURANCE According to a report prepared by the Women's Equity Action League, it is not uncommon to find that, despite higher premiums paid by women, the benefits they receive are much lower than those received by men. Health insurance often does not cover pregnancy and related conditions; the rationale is that pregnancy is a "voluntary condition." The same health plan often covers other voluntary disabilities, however, such as sports injuries and vasectomies.

LIFE INSURANCE Under certain policies, a married woman is allowed to purchase coverage only up to the amount of the husband's policy, regardless of her own earning power. Sex-based life-expectancy tables are used to set different rates for men and women. Women must demonstrate need to qualify for the option to forego premium payments during disability; this benefit is automatically granted to men.

QUESTIONS

Q. Will the net effect of the ERA on insurance be higher insurance costs for women?

A. Because women are now overcharged for all lines of insurance, the net effect of the ERA would be lower insurance costs for women.

Women as a group now benefit from sex-based rates in life and auto insurance (but only when they are young). The high costs and low benefits in the areas of health, disability, or annuity coverage, however, greatly outweigh the advantages to women in life and auto coverage. The ERA would institute treatment of women as individuals. Men and women will gain from a system which classifies risks on the basis of individual behavior or characteristics more closely related to mortality, morbidity, or casualty experience.

ERA AND THE MILITARY

The ERA will prohibit denying women entry, promotion, education and training in the service branches solely and exclusively on the basis of gender.

BACKGROUND

The military is the largest employer and educator in the nation and yet is virtually immune from policies and laws prohibiting sex discrimination. Women are denied entry to every service branch, promotion opportunities, education and training not on the basis of their capabilities but simply because of their sex. These discriminatory policies limit opportunities for women and the contribution they can make to our nation. Currently, federal statutes restrict the manner in which the Secretaries of the Air Force and Navy can assign women, and all the services (except the Coast Guard) further restrict the roles women can play.

These restrictions jeopardize the women who must serve in dangerous military situations without the training and support essential to survival. Further, they perpetrate harmful, archaic and overbroad stereotypes about the capabilities of women and the role of women and men in society. Exclusion from full participation in military service also means lost opportunities for college scholarships, veterans' education benefits, veterans' preference in government employment, veterans' insurance and loan programs, and limited access to the revolving door of the military/industrial connection--where the private sector pays well for the defense related skills of former service members.

Exclusion of women from the military is an economic issue. The Texas Population Research Center has just released data showing that among employed women of all races, those who have served in the Armed Forces are almost twice as likely to earn salaries at least $300 per week better than those women who have not.

QUESTIONS

Q. Would women be eligible for the draft under the ERA?

A. Under the ERA, women would be treated equally with men with regard to registration for the draft. However, certain women, like certain men, may be exempted from the draft as conscientious objectors, the parents of dependent children, or because of medical reasons. Once inducted, men and women would be assigned responsibilities on the basis of service needs and individual qualifications, not gender.

Q. If the ERA is not enacted, are women protected from the draft?

A. No. The Department of Defense has already prepared legislation designed to alter existing law so that both sexes can be subject to future conscriptions.

Q. Would the ERA result in women being assigned to combat duties?

A. There is no current statute or policy that defines "combat." Combat exclusion rules are often inconsistent among the service branches and have been altered many times over the years. These rules reflect the needs of each service; they are not designed to protect women. Women, like men, will be assigned to those jobs for which they are qualified.

Q. Would the ERA eliminate job-related qualifications in the military?

A. No, just the reverse. Under the ERA, all military positions, including combat positions, would be filled by the most qualified individuals available. Women and men who are physically or psychologically unsuited for a combat-related job would be excluded from such an assignment.

Q. What effect would the eligibility of women for combat have on military effectiveness?

A. Despite repeated studies to establish the limits of our military women's capabilities, no such limitation has been demonstrated. Army studies show that increasing the proportion of women in combat support and combat service support units has no measurable effect on unit performance in field training exercises.

ERA: PUBLIC SUPPORT

The nation overwhelmingly supports the Equal Rights Amendment:

In June 1981, TIME magazine reported that the Equal Rights Amendment was supported by more than a two-to-one margin.

Independent polls conducted nationwide show three-quarters of U.S. voters support exact wording of the ERA.

Over 450 major organizations with memberships well over 50 million have endorsed the ERA.

Support and Opposition to the ERA by the American Public:

Year	Favor (%)	Oppose (%)	Don't Know (%)	Total (%)	Total (N)
1974	73.6	21.1	5.2	100	2822
1975	58.3	23.7	18.0	100	2762
1976	56.7	24.5	18.8	100	2798
1977	65.5	26.5	8.0	100	1000
1978	58.0	31.0	11.0	100	1010
1980	52.3	28.3	19.4	100	2780
1981	55.5	28.1	16.4	100	2740
1982	61.5	23.4	15.1	100	1506

Source: Gallup Poll; National Opinion Research Center General Social Survey

IN CONCLUSION: In 1982, a 63 to 33 percent majority supported the ERA. This is the fourth highest percentage of American support EVER recorded in favor of the amendment's passage. People have clearly not given up hope that, ultimately, the constitutional guarantee of equal rights for women will be ratified. (Harris Survey, 1982.)

10/25/83

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The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under The Constitution

United States Commission on Civil Rights
Clearinghouse Publication 68

June 1981

1. How Will Ratification of the Equal Rights Amendment Affect Laws and Governmental Action Concerning Women?

The system of laws in the United States is like a patchwork quilt: the rights of individuals in one State vary greatly from the rights of individuals in another, and where the actions of individuals are subject to Federal laws, their rights may be different still. This Federal system of government was carefully incorporated in the United States Constitution, and respect for the coexistence of State and Federal jurisdictions is basic to the Nation.

Within this system, however, certain principles of freedom and individual dignity have been viewed as preeminent. Thus, individual States are free to govern as they choose, but they may not interfere with freedom of speech; they may not discriminate on the basis of race, national origin, or religion; they may not deny an individual the right to vote on the basis of race or of sex.

The proposed Equal Rights Amendment is consistent with this scheme. It makes clear that men and women should be treated equally by all levels of government—the exclusive target of the ERA. The amendment is necessary because, historically, discrimination against individuals based on whether they are female or male has been deeply entrenched in our laws and persistently reflected in governmental action. The Senate Judiciary Committee that successfully recommended the amendment's adoption by Congress concluded that the ERA is essential because of the extensive sex discrimination

> directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas. The social and economic cost to our society, as well as the individual psychological impact of sex discrimination, are immeasurable. That a majority of our population should be subjected to the indignities and limitations of second class citizenship is a fundamental affront to personal human liberty.[18]

Some States have already undertaken a basic commitment to equal rights. But the piecemeal implementation of this commitment has been uneven, and other States have barely made the commitment at all. There are still "[t]housands of State laws, most of them historical hangovers, [that] typecast men and women."[19] Nor has the Federal Government fully removed sex bias from its own code and regulations.[20] Moreover, where States and the Federal Government have acted through their legislatures and courts to promote equal rights without regard to whether an individual is female or male, their actions are not secure. As the American Bar Association recently stated in explaining the need for the ERA:

> No ordinary statute can provide the bedrock protection assured by a Constitutional Amendment. No Court decision can provide that protection, for the courts may interpret, but they may not amend the Constitution.[21]

Ratification of the Equal Rights Amendment will provide a durable guarantee to women and men of equal status and dignity under the law.[22] It will allow us to live and develop free from the government intrusion that historically has classified and pigeonholed men and women according to stereotypes about their roles and capabilities. The devastating effect on women of this persistent discrimination and the changes to be secured by the ERA are discussed below.

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[18] U.S., Congress, Senate, Committee on the Judiciary, *Equal Rights for Men and Women*, 92d Cong., 2d sess., 1972, S. Rep. 92-689, p. 7 (hereafter cited as *Senate ERA Report*).

[19] Ginsburg, "Sexual Equality," p. 174.

[20] See U.S., Department of Justice, Task Force on Sex Discrimination, Civil Rights Division, *Interim Report to the President* (Oct. 3, 1978) (hereafter cited as *Interim Report*); U.S., Commission on Civil Rights, *Sex Bias in the U.S. Code* (1977).

[21] American Bar Association, *About the ERA* (April 1980), p. 2.

[22] Ginsburg, "Sexual Equality," p. 161. (This is the "animating purpose" of the proposed Equal Rights Amendment.)

How Will the Equal Rights Amendment Affect Women in the Paid Labor Force?

Women's participation in the labor force has increased dramatically, with more women employed outside the home today than ever before in history. By 1979, 43 million women, or 51 percent of all women in this country, were employed or looking for jobs. Over 7.4 million held jobs in government alone—at Federal, State, and local levels. Statistics show that the participation of married women in the labor force is similar to that of all women: in March 1979, approximately 50 percent of all wives were employed or looking for jobs. For young women, the participation rate is even greater—64 percent of all women aged 25 to 34 were in the labor force by the end of the decade, including 54 percent of the mothers who are in this age group.[53]

Clearly, with a steadily increasing majority of all women employed, vast numbers of women are vulnerable to discriminatory employment practices based on sex. Moreover, where job opportunities and wages are limited by sex bias, the harm is not only felt by women, but also by the families they support, whether in conjunction with their husbands[54] or on their own as heads of household.[55]

Yet, despite the existence of Federal[56] and State[57] equal employment opportunity laws, women continue to be victims of pervasive discriminatory practices in the labor force. The ERA is needed to help end governmental action that limits opportunities available to women throughout the labor force and to close loopholes in existing antidiscrimination laws so as to make it clear that public employment practices that discriminate against women are illegal.

Laws Limiting Employment Opportunities for Women

- Equal employment opportunities for women continue to be limited by remnants of the restrictive labor legislation passed by the Federal and State governments in the late 19th and early 20th centuries and after the Second World War.[58] These laws limited the occupations open to women,[59] restricted the number of hours women could work,[60] and regulated working conditions for women.[61]

Stereotyped beliefs about women's roles and capabilities were given as the rationale for passage of these laws: women were seen as physically weak and as occupying only a transient and secondary role in the labor market. In addition to reinforcing and perpetuating these stereotypes, such restrictive labor laws also served to reduce the competition by women for better paying jobs.[62]

Rather than protecting women, the provisions discriminated against them by making it difficult for qualified women to obtain desirable and high-salaried jobs and by creating obstacles to promotions and supervisory positions.[63] The restrictive nature and discriminatory effect on women of protective labor legislation have been specifically acknowledged by the United States Senate as one of the reasons the Equal Rights Amendment is needed.[64]

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[53] See U.S., Department of Labor, Bureau of Labor Statistics, *Perspectives on Working Women: A Databook* (Bulletin 2080, 1980) (hereafter cited as *Perspectives on Working Women*).

[54] In 1978 full-time, all-year, wage-earning wives contributed approximately 38 percent of their families' income. Ibid., p. 57.

[55] Twenty-one million persons, or 13 percent of all families, were living in female-headed households in 1975. U.S., Commission on Civil Rights, *Women Still in Poverty* (1979), p. 18. Almost two-fifths of all families headed by women have incomes below the poverty level. A large proportion of these families are headed by black women whose families include half of all children living in poverty. U.S., Department of Labor, Women's Bureau, *The Employment of Women: General Diagnosis of Developments and Issues* (April 1980), p. 7 (hereafter cited as *The Employment of Women*).

[56] The two principal Federal statutes that prohibit sex discrimination in employment are the Equal Pay Act, 29 U.S.C. §206(d) (1976) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1976).

[57] *E.g.*, Alaska Stat. §§18.80.220(a), 23.10.155 (1972 and Supp. 1979); Cal. Labor Code §§1197.5(a), 1413 (West 1971); Me. Rev. Stat. Ann. tit. 5, §4572, tit. 26, §628 (West 1964). Not all States, however, have such laws; for example, Alabama and Mississippi have not enacted State equal pay or fair employment practices laws.

[58] Barbara A. Brown, Ann E. Freedman, Harriet N. Katz, and Alice M. Price, *Women's Rights and The Law: The Impact of the ERA on State Laws* (New York: Praeger Publishers, 1977), p. 209.

[59] *E.g.*, N.Y. Labor Law §176 (McKinney 1965) (prohibited employment by women as messengers during certain hours), *repealed by* L. 1973, ch. 377, §11; Wash. Rev. Code Ann. §49.12.200 (1962) (prohibited women serving in public office), *as amended by* L. 1963, ch. 229, §1.

[60] *E.g.*, Ill. Rev. Stat. Ch. 48, §5 (1969), *repealed by* P.A. 80-266, §1, effective Oct. 1, 1977. *See* Brown and others, *Womens Rights and the Law*, pp. 210-11.

[61] *E.g.*, D.C. Code Ann. §36-310 (1968), *amended by* Act Oct. 1, 1976, D.C. Laws, No. 1-87, §37(a), D.C. Reg. No. 6, p. 1134. *See Women's Rights and the Law*, p. 211.

[62] Barbara Allen Babcock, Ann E. Freedman, Eleanor Holmes Norton, and Susan C. Ross, *Sex Discrimination and the Law: Causes and Remedies* (Boston: Little, Brown 1975), pp. 247-87.

[63] Brown and others, *Women's Rights and The Law*, pp. 209-10.

[64] The *Senate ERA Report* states:

> Most States have enacted so-called "protective" labor legislation in one form or another. Many of these laws are not protective at all, but rather are restrictive, and have been shown to have a discriminatory impact when applied only to women. For example, a law which limits the working hours of women but not of men makes it more difficult for women to obtain work they desire and for which they are qualified, or to become supervisors. State laws which limit the amount of weight a woman can lift or carry arbitrarily keep all women from certain desirable or high-paying jobs, although many if not most women are fully capable of performing the tasks required. *Senate Report*, p. 9.

Although many of these discriminatory statutes have been repealed[35] or invalidated,[36] some still remain on the books as badges of sex discrimination and symbols of sex stereotyping operating to deprive women of jobs. For example, statutes that establish a maximum number of hours women are permitted to work in certain jobs still exist in Mississippi[37] and New Hampshire.[38] The doors to certain jobs are still entirely closed to women by laws in Arkansas,[39] Missouri,[40] Ohio,[41] and by the Federal Code.[42] These statutes, although of dubious validity, nevertheless continue to exist and may be tacitly enforced.[43] The woman who is denied a job because of such State or Federal laws will not always know enough about her legal rights to challenge the denial. If she does know her legal rights, she may not have the resources to pursue the battle to enforce them.

Ratification of the ERA will require that labor laws treat women and men equally. Not only will existing Federal and State restrictive laws that discriminate against individuals on the basis of their sex clearly be invalid,[44] but also ratification will provide the impetus necessary for Federal and State legislatures to act at last to eliminate the remaining sex-based laws from their respective codes during the 2-year legislative transition period.[45] During this revision process, protective labor provisions that really protect workers—such as laws that provide for rest periods, minimum wages, overtime pay, and health and safety protections—will, it is expected, be extended to cover both men and women. This extension of benefits would flow directly from the legislative intent expressed by Congress in adopting the Federal ERA.[46]

• Sex-based discrimination also is legislated into government programs intended to give welfare recipients the training and skills necessary for them to obtain employment and eliminate their dependence on welfare. For example, although three out of four individuals eligible and registered for job placement in the Federal work incentive program (WIN)[47] are women,[48] the program is required by statute to give priority to the placement of unemployed fathers.[49] Even when women are placed in jobs through WIN, their average entry wage is only $2.97 per hour, less than three-fourths of the average entry wage of $4.01 per hour earned by men placed by the program.[50]

Wage Discrimination

• The wage gap that persists between all employed women and men is even greater than the differential found among men and women in this Federal job training program. Employed women today receive, on the average, only 59 cents for every dollar earned by men.[51] Among the primary factors contributing to the creation and perpetuation of this wage gap are the occupational segregation of women employees and the lower wages paid in jobs that are, and traditionally have been, held largely by women.[52] Women workers continue to be concentrated in the lowest paying, least valued jobs, regardless of whether their employer is a branch of the State or Federal government or a private corporation.[53] This job segregation is due, in part, to the legal barriers that historically barred women from certain jobs and employment activities[54] and to practices that until recently were sanctioned by law, such as the posting of job descriptions labeling positions as open only to men or to women.[55] In some instances the practice of labeling positions as "women's" or "men's" jobs persists.[56]

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[35] See U.S. Department of Labor, Employment Standards Administration, Women's Bureau, *State Labor Laws in Transition: From Protection to Equal Status for Women*, Pamphlet No. 15 (Washington, D.C.: Government Printing Office, 1976).

[36] E.g., Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (invalidating weight lifting and maximum hours statutes under Title VII); Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973) (invalidating job prohibition, weight, and maximum hours laws under Title VII); Garneau v. Raytheon Co., 323 F. Supp. 391 (D. Mass. 1971) (invalidating restrictive hours law under Title VII).

[37] Miss. Code Ann. §71-1-35 (1972).

[38] N.H. Rev. Stat. Ann. §§275:15-17 (1977).

[39] Ark. Stat. Ann. §52-612 (1971) (working in mines).

[40] Mo. Ann. Stat. §292.040 (Vernon 1972) (cleaning or working in certain places near machinery.)

[41] Ohio Rev. Code Ann. §4107.43 (Anderson 1973) (prohibits women from, among other occupations, being a gas or electric meter reader, bellhop, or bowling alley pin setter, operating nonautomatic freight elevators, or driving a taxi between 9 p.m. and 6 a.m.).

[42] 41 U.S.C. §35(d) (Supp. 1979) (certain government contracts must stipulate that females under 18 may not be employed in fulfilling the contract, while the minimum age for males is 16).

[43] Brown and others, *Women's Rights and the Law*, p. 218.

[44] Protective labor laws precluding women from employment opportunities have been invalidated under State ERAs. *E.g.*, Vick v. Pioneer Oil Co., 569 S.W.2d 631 (Tex. Civ. App. 1978). *See 1978 ERA Statement*, pp. 27-28.

[45] For example, in Massachusetts, a jurisdiction with a State ERA, the legislature has suspended the operation of statutes that restrict the jobs available to women. Mass. Ann. Laws ch. 149, §§53-54 (Supp. 1979), suspended by St. 1979, C. 140 (May 11, 1979). The legislature in Illinois, which also has a State ERA, repealed statutes that set a maximum number of hours women could work each day. Ill. Ann. Stat. ch. 48, §§5-8.1 (Supp. 1979), repealed by P.A. 80-260, §1, eff. Oct. 1, 1977.

[46] *Senate ERA Report*, p. 15.

[47] 42 U.S.C. §§630-644 (1976 and Supp. 1978). WIN is the only Federal employment program specifically targeted at recipients of Aid to Families with Dependent Children (AFDC), 90 percent of whom are women. *The Employment of Women*, p. 21.

[48] U.S. Commission on Civil Rights, *Women Still in Poverty* (1979), p. 14.

[49] 42 U.S.C. §633(a) (1976); see *Women Still in Poverty*, pp. 2, 14.

[50] *The Employment of Women*, p. 216.

[51] Ibid., p. 7. In fact, since the 1950s, the average annual earnings gap between female and male employees has increased. During the 1950s full-time female workers earned 64 percent of what similarly situated male employees earned. Today, that figure is 59 percent. Ibid.

[52] The intimate connection between occupational sex segregation and women's lower earnings is recognized in *The Employment of Women*, pp. 6-7.

The low wages assigned to traditionally female jobs—paying government secretaries less, for example, than government parking lot attendants and ranking child care workers on a par with dog pound attendants[57]—result from and perpetuate women's social, economic, and legal disabilities.[58] In some instances, jobs held by women have been paid less because of overt discrimination.[59] Yet at present, there is considerable doubt as to whether any of the existing Federal or State antidiscrimination statutes reach such wage disparity even when it is directly traceable to sex-based wage discrimination.[60] The ERA would clearly prohibit such discrimination by public employers. This, in turn, would have an immediate effect on narrowing the earnings gap between men and women, since the Federal, State, and local governments employ more persons than any single private sector industry.[61]

Loopholes in Antidiscrimination Laws

- Existing laws prohibiting sex-based discrimination by public employers contain many loopholes that would be closed by the Equal Rights Amendment.[62] For example, while most government employees are protected from sex discrimination by Title VII of the Civil Rights Act of 1964,[63] the most comprehensive Federal statute prohibiting sex discrimination in employment, Congress carved out exceptions for the employment practices of its Members and other elected officials.[64] Similar exemptions are found in the Federal Equal Pay Act[65] and State antidiscrimination laws in jurisdictions such as Arizona,[66] Illinois,[67] and South Carolina.[68] Although legislators and other elected officials are not included within the scope of these laws prohibiting employment discrimination by the rest of the country, and their employees therefore have fewer rights, the evidence is that their employment practices are not immune from sex bias.[69] A 1980 study revealed, for example, that Members of Congress pay female employees lower salaries than male employees and give women fewer top jobs.[70]

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[53] Ibid., pp. 6-7, 42. Women comprise 99 percent of all secretaries, 96 percent of all food service workers, 90 percent of all health service workers, and 71 percent of all kindergarten, elementary, and secondary school teachers; yet women constitute less than 12 percent of all sales representatives, 21 percent of all shipping clerks, 6 percent of all craft workers, and 12 percent of all lawyers, and judges. *Perspectives on Working Women*, table 11, pp. 10-11.

[54] Ruth G. Blumrosen, "Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964," *University of Michigan Journal of Law Reform* (Spring 1979) vol. 12, pp. 402-4.

[55] Ibid., p. 405.

[56] See *Interim Report*, p. vi.

[57] Ellen Goodman, "Earning Less for Women's Work," *Washington Post*, Oct. 16, 1978, p. A-23.

[58] See Blumrosen, "Wage Discrimination," pp. 402-37.

[59] Ibid., pp. 421-26. See also, Center for Women in Government, "Sex-Segregated Career Ladders in New York State Government: A Structural Analysis of Inequality in Employment" (State University of New York, Albany, 1976); Winn Newman, "Policy Issues III," *Signs: Journal of Women in Culture and Society* (University of Chicago, 1976), p. 265.

[60] The Federal courts, for example, are divided as to whether women can assert a wage discrimination claim under Title VII where the claim would not fit within the narrow requirements of the Equal Pay Act (which requires equal pay only between jobs of equal skill, responsibility, and effort). *Compare* Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979), *cert. granted*, —U.S.— (1980) (No. 80-429), and I.U.E. v. Westinghouse, 631 F.2d 1094 (3rd Cir. 1980), *petition for cert. pending*, with Lemons v. City of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, —U.S.—, 101 S. Ct. 244 (Oct. 6, 1980), and Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977).

[61] See *Perspectives on Working Women*, p. 12. As of September 1980, Federal, State, and local governments employed 18 percent of all nonagricultural employees in the United States and 20 percent of all employed women. U.S., Department of Labor, Bureau of Labor Statistics, *Employment and Earnings December, 1980*, vol. 27, no. 12. The median earnings for women employed by the Federal Government are $240 per week; for men the weekly figure is $348. U.S., Department of Labor, Bureau of Labor Statistics, unpublished tabulations from the 1979 Current Population Surveys.

[62] Congress specifically recognized that the ERA is necessary in order to protect women workers completely. The *Senate ERA Report* states that Title VII and the Equal Pay Act "fail to reach discrimination in many areas, allow for substantial exemptions in some cases, and have often been implemented too slowly." *Senate ERA Report*, p. 7.

[63] 42 U.S.C. §§2000e-2000e-17 (1976 and Supp. III 1979).

[64] The exemption for State and local elected officials is spelled out in 42 U.S.C. §2000e(f) (1976), which excludes from the definition of "employee" for purposes of Title VII coverage:

> any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office unless such person is covered by appropriate State or local civil service laws.

The exemption for Members of Congress was created by limiting Title VII coverage of legislative employees to those in the competitive service. 42 U.S.C. §2000e-16(a) (1976) provides as follows:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

The precise scope of this section is unclear; some employees within some congressional service agencies may be within the competitive service and therefore covered by Title VII. For a fuller discussion, see U.S., Commission on Civil Rights, *Extending Equal Opportunity Laws to Congress* (June 1980) (hereafter cited as *Extending Equal Opportunity Laws to Congress*).

[65] 29 U.S.C. §203(e)(2) (1978).

[66] Ariz. Rev. Stat. §41-1461(1) (1974).

[67] Ill. Ann. Stat., ch. 48, §852(c) (Smith-Hurd Supp. 1980-81).

[68] S.C. Code §1-13-30(h) (Supp. 1979).

Yet another loophole that exists on the face of Title VII, and has been relied upon to deny jobs to women, allows sex to be considered a "bona fide occupational qualification" for a job. On the basis of this exception, the Supreme Court of the United States held that a woman could be denied a government job as a prison guard because of her "very womanhood."[71]

Ratification of the ERA will require the cessation of sex-discriminatory employment practices by all government personnel and entities, including Members of Congress and administrators of governmental benefit programs such as WIN. It will reaffirm and make secure the government's commitment to equal opportunity for all workers. Adoption of the ERA will close existing loopholes for claims of discrimination by public employers and, generally, will provide the impetus for a more vigorous enforcement of antidiscrimination laws and policies.

How Will the Equal Rights Amendment Affect Women Who Are Married?

Laws concerning marriage traditionally have defined woman's rights as those of a second-class citizen.[72] Although many changes in such laws over the past century have brought greater equality to the legal status of husbands and wives, discriminatory provisions still persist in the patchwork quilt of laws that vary from State to State. Such laws set different rules for males and females entering marriage,[73] define different rights for them during marriage with respect to property,[74] to each other,[75] to their children,[76] and to third parties[77] and grant different rights at the end of the marriage.[78] These laws are rooted in the English common law view of the married woman as the property of her husband,[79] destined to be economically dependent upon him and obligated to provide him domestic services and companionship,[80] which were not recognized as having any economic value.[81]

Laws Concerning Marital Property and Rights of Husbands and Wives

Under the common law, married women suffered a total loss of property rights. In response to this harsh system, a movement began in the 19th century that led to the piecemeal passage of reforms. The purpose of the reform laws was to ensure that property a woman brought to her marriage or acquired afterwards would be her separate property, and not subject to the domination or improvidence of her husband or liable for his debts.[82] These reform laws varied greatly from State to State.[83] To this day, however, laws governing property rights during marriage retain outmoded and archaic common law concepts about ownership, possession, and control of marital property that discriminate against women.[84]

For example, some States still follow the common law presumption that household goods that were purchased, possessed, and used by both spouses during the marriage belong solely to the husband.[85] Today in North Carolina, as was true under common law, real property held jointly by husband and wife in a form of co-ownership known as "tenants by the entirety" is under the exclusive control, use, and possession of the husband. Moreover, the husband is entitled to all the rents and profits produced by this property.[86]

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[69] See *Extending Equal Opportunity Laws to Congress*, pp. 9–12. The U.S. Supreme Court has recognized that a cause of action for employment discrimination can be pursued against a Member of Congress based on the fifth amendment to the Constitution. Davis v. Passman, 442 U.S. 228 (1979).

[70] Florence Graves, "The Congressional Double Standard," in *Common Cause* (October 1980), p. 14; see, also, *Extending Equal Opportunity Laws to Congress*.

[71] Dothard v. Rawlinson, 433 U.S. 321, 336 (1977); See 433 U.S. at 345–47 (Marshall, J., concurring in part and dissenting in part).

[72] See generally *1978 ERA Statement*, pp. 5–8; Leo Kanowitz, *Women and the Law* (Albuquerque: University of New Mexico Press, 1969), pp. 35–99.

[73] See Ark. Stat. Ann. §55-102 (Supp. 1979); La. Civ. Code Ann. art. 92 (1972); Miss. Code Ann. §93-1-5(d) (1972).

[74] See discussion of marital property, following.

[75] See Ga. Code §53-501 (1974); Okla. Stat. Tit. 32, §2 (1971).

[76] See Thorne v. Odom, 349 So.2d 1126 (Ala. Sup. Ct. 1977) (fathers have priority over mothers as plaintiffs in actions for wrongful death or injury of a child).

[77] Under the common law, for example, only the husband had the right to sue third parties for the loss of "consortium," i.e., the loss of his wife's services. A 1950 District of Columbia case, Hitaffer v. Argonne Co., Inc., 183 F.2d 811 (D.C. Cir. 1950), held that a married women had a cause of action for loss of consortium, and courts applying State ERAs have done the same. See discussion of third party issues in *Laws Concerning Marital Property and Rights of Husbands and Wives*, following. The laws in 38 States and the District of Columbia have been changed to extend such rights to both spouses. Of the remaining 12 States, 6 follow the common law rule limiting loss of consortium suits to husbands, and 6 have abolished such actions for spouses of both sexes. See Brown and others, *Women's Rights and The Law*, p. 118.

[78] See discussion of divorce, following. See, also, Wisconsin, Governor's Commission on the Status of Women, *Real Women, Real Lives—Marriage, Divorce, Widowhood* (1978).

[79] See Blanche Crozier, "Marital Support," *Boston University Law Review* (January 1935), vol. 15, p. 28.

[80] See, e.g., Pierce v. Pierce, 267 So.2d 300, 302 (Miss. Sup. Ct. 1972); Tryon v. Casey, 416 S.W.2d 252 (Mo. Ct. App. 1967).

[81] Gebhard v. Gebhard, 253 Md. 125, 127–130, 252 A.2d 171 (1969). Later cases, however, recognized the value of nonmonetary contributions with respect to property rights in household goods and furnishings. Bender v. Bender, 386 A.2d 772 (MD. 1978).

[82] See National Bank of Rochester v. Meadowbrook Heights, Inc., 80 Mich. App. 777, 265 N.W.2d 43, 46 (1978); Kanowitz, *Women and the Law*, pp. 40–41.

[83] Ibid. See, e.g., Ark. Stat. Ann. §55–404 (1971); Conn. Gen. Stat. Ann. §46b-36 (Supp. 1980); Ky. Rev. Stat. §§404.010, 404.020, 404.050 (Supp. 1978).

[84] *See generally* Brown and others, *Women's Rights and the Law*, pp. 97–202.

Under the ERA, the equal right of a married woman to ownership, possession, and management of marital property during marriage will be strengthened. Discriminatory provisions would be invalidated. Thus, for example, applying its State ERA, the Pennsylvania Supreme Court has held invalid the common law presumption that household goods and furnishings belong to the husband.[87] This discriminatory presumption was similarly rejected in Virginia after the adoption of a State equal rights provision, when the legislature enacted a statute expressly prohibiting any presumption favoring one spouse over the other in determining ownership of tangible personal property.[88]

Laws giving husbands exclusive rights to control aspects of the marriage still exist in States such as Oklahoma, where a statute provides that the husband is the head of the household, that he may select any reasonable place of residence and the style of living, and that the wife must conform to his wishes.[89] A Georgia statute names the husband as "the head of the family and the wife. . .subject to him."[90] Louisiana persisted into 1979 with a law designating the husband as the "head and master" of all marital property.[91]

The ERA will result in changes in these and other laws that on their face treat males and females differently, such as laws that impose a different age of consent for marriage.[92] In addition, laws that grant different rights, privileges, or protections to wives and husbands will be invalid unless extended to both spouses.

For example, laws that give the husband alone the right to recover damages from a third party who negligently injures his spouse,[93] or for the wrongful death or injury of their child,[94] would be extended under the ERA to give the same right to the wife. Courts applying State ERAs in Pennsylvania,[95] Alaska,[96] Texas,[97] and Washington[98] have already extended the common law right to sue for "loss of consortium" so that women as well as men may recover from a third party who causes a spouse to become disabled, holding that husbands and wives are partners in marriage and must be treated fairly and equally.

Laws Concerning Support

The common law also imposed different rights and obligations on husbands and wives based on the view of husbands as solely responsible for support and wives for homemaking services and "companionship"[99]. However, the duty of support that was placed upon husbands never truly protected wives made vulnerable by the economic dependence imposed upon them.[100] Courts have refused to enforce support obligations *during* marriage, because they are unwilling to invade the privacy established by the marital relationship. As a result, even if a husband denies his wife money for her most basic needs—clothes, health care, food—she cannot, as long as she continues to live with him, realistically expect to obtain a court order requiring him to provide her with reasonable support money.[101] As a practical matter, before a wife can obtain a support order there must be a breakdown of the marital relationship and an action commenced for legal separation or divorce.[102] Contrary to popular belief, support laws do not help to keep a family intact.

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[85] See, e.g., Upchurch v. Upchurch, 76 Ga. App. 215, 45 S.E. 2d 855 (1947).

[86] Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); Rauchfuss v. Rauchfuss, 33 N.C. App. 108, 234 S.E.2d 423 (1977) (Rents and profits may be charged with the support of the wife.)

[87] DiFlorido v. DiFlorido, 459 Pa. 641, 331 A.2d 174, 178-79 (The court also relied on the "emancipation of married women over their property" and on changing social conditions to bolster their departure from earlier common law precepts.)

[88] Va. Code §55-47.1 (Supp. 1980).

[89] Okla. Stat. tit. 32, §2 (1971).

[90] Ga. Code §53-501 (1974).

[91] See Kirchberg v. Feenstra, 609 F.2d 727 (5th Cir. 1979) (declaring law unconstitutional and describing revisions effective Jan. 1, 1980), *prob. juris. noted*, — U.S. —, 100 S. Ct. 1899, (1980).

[92] Although at one time most States set different age minimums for males and for females, today all but three States impose the same age limitations on both sexes. Only Arkansas, Louisiana, and Mississippi maintain sex-based restrictions on the age of consent. Ark. Stat. Ann. §55-102 (Supp. 1979); La. Civ. Code Ann. art. 92 (1972); Miss. Code Ann. §93-1-5(d) (1972). Under the ERA, these sex-based age differentials would be invalid. The experience in Illinois, a jurisdiction with a State ERA, is illustrative. In Phelps v. Bing, 58 Ill. 2d 32, 316 N.E.2d 775 (Ill. Sup. Ct. 1974), the court held that the differential age minimum for males and for females violated the Illinois State ERA.

[93] Roseberry v. Starkovich, 73 N.M. 211, 387 P.2d 321 (1963). See Brown and others, *Women's Rights and the Law*, p. 118.

[94] Thomas v. Odom, 349 So.2d 1126 (Ala. Sup. Ct. 1977).

[95] Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974).

[96] Schreiner v. Fruit, 519 P.2d 462 (Alaska Sup. Ct. 1974).

[97] Miller v. Whittlesey, 562 S.W.2d 904 (Tex. Civ. App. 1978), *aff'd. sub nom.* Whittlesey v. Miller, 572 S.W.2d 665 (Tex. Sup. Ct. 1978).

[98] Lundgren v. Whitney's, Inc., 614 P.2d 1272 (Wash. Sup. Ct. 1980).

[99] Also related to this common law doctrine is the view that a husband has an *absolute* right to sexual relations with his wife. This is the basis for the virtually universal rule prohibiting married women from charging their spouses with rape. Brown and others, *Women's Rights and the Law*, p. 54. As of June 1980, 47 States barred a woman from charging her husband with rape if she were married and living with him. National Center on Women and Family Law, Marital Rape Exemption, mimeographed (New York: undated). A few States have stricken or modified the marital rape exemption. New Jersey law, for example, provides that "No actor shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim." N.J. Stat. Ann. §2C:14-5(b) (West Supp. 1980).

[100] See generally Kenneth Davidson, Ruth Ginsburg, and Herma Hill Kay, *Sex Based Discrimination* (West Publishing Co. 1974), pp. 139-48.

The husband's duty to support his wife has traditionally been treated more seriously by the legal system when the victim is a creditor who has furnished the wife with "necessaries" for her support. Under this common law "necessaries doctrine," husbands have been held liable to creditors for necessaries purchased by wives.[103]

As with the duty of support, however, this legal doctrine does not give the wife any effective rights. It does not increase her ability to make purchases for which her husband would be held liable. Due to the burden of litigating to enforce the husband's duty, many merchants are not willing to extend credit to a woman in her own name for the purchase of necessaries; store owners often require the husband to sign before credit will be granted to the wife.[104]

The Supreme Court of the United States and State courts have already signaled the unconstitutionality of laws imposing different financial responsibilities on married individuals solely on the basis on whether they are female or male.[105] Many States have addressed the inequities inherent in the common law scheme and enacted statutes that require both spouses to support each other according to their respective financial means and needs[106] and/or family expense laws making both spouses responsible to creditors for family purchases.[107]

The Equal Rights Amendment, similarly, will require that marriage laws be based on functions performed by spouses within the family instead of on gender. This would leave couples free to allocate responsibilities according to their own preferences and capabilities, so that husband and wife will be responsible to each other to an extent consistent with their individual resources, abilities, and the type of contribution each person makes to the family unit. This analysis is consistent with the reality that marriage is an economic as well as social and emotional partnership, where each spouse makes equally valuable, albeit different, contributions.[108]

The ERA will not require, however, that a husband and wife contribute identical amounts of money to a marriage. It will not require that the wife obtain an income-producing job outside the home. As the legislative history of the ERA makes clear:

> The support obligations of each spouse would be defined in functional terms based, for example, on each spouse's earning power, current resources and nonmonetary contributions to the family welfare. . . .[W]here one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of her or his duties.[109]

The crucial importance of the homemaker's contribution to the marriage is expressly recognized in the debates and reports that form the legislative history of the Equal Rights Amendment.[110] The

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[101] See, e.g., Commonwealth v. George, 358 Pa. 118, 56 A.2d 228 (1948); McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (Neb. Sup. Ct. 1953). The court in *McGuire* stated:

> As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out. 59 N.W.2d at 342. See also Paulsen, "Support Rights and Duties," *Vanderbilt Law Review* (1956), vol. 9, pp. 709, 719.

[102] *Id.*

[103] This rule flows directly from the husband's supposed obligation to support his wife. The law presumed that the wife incurred liabilities for necessaries because the husband did not provide her with money to buy needed goods and services. Therefore, it became the husband's duty to reimburse the creditors who furnished these items to his wife. Jersey Shore Medical Center–Fitkin Hospital v. Estate of Baum, 417 A.2d 1003, 1005 (N.J. Sup. Ct. 1980).

[104] Judith Areen, *Cases and Materials on Family Law* (Mineola, N.Y.: The Foundation Press, 1978), p. 73.

[105] See Orr v. Orr, 440 U.S. 268 (1979) (statute under which husbands, but not wives, could be ordered to pay alimony, violates the equal protection clause of the United States Constitution). See, also, Manatee Convalescent Center, Inc. v. McDonald, 7 Family Law Reptr. 2181 (Fla. Ct. App., Dec. 31, 1980); Jersey Shore, 417 A.2d 1003.

[106] *E.g.*, Cal. Civ. Code §5132 (West Supp. 1974); Del. Code Ann. tit. 13, §§502, 506 (Supp. 1978); Mont. Rev. Code Ann. §36-103 (Supp. 1977); Va. Code §20-61 (Supp. 1979).

[107] *E.g.*, Colo. Rev. Stat. §14-6-110 (1973); Ill. Ann. Stat., ch. 68, §15 (1976); Utah Code Ann. §30-2-9 (1976); Wyo. Stat. §20-1-201(1977).

[108] *E.g.* Jersey *Shore*, 417 A.2d 1003. Recognition of this reality forms the theoretical underpinnings of marital property laws in the eight community property States and is the major guiding principle behind model legislation developed in 1970, the Uniform Marriage and Divorce Act (UMDA). See, Krauskopf, "A Theory for 'Just' Division of Marital Property in Missouri," *Missouri Law Review* (1976), vol. 41, p. 165. The original UMDA was approved by the Commissioners of Uniform Laws in August 1970. It is a model act—proposed legislation for the States to enact as they deem appropriate—and only becomes the law when adopted by a State legislature.

[109] *Senate ERA Report*, p. 17.

[110] Ibid. See, also, Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," *Yale Law Journal* (1971), vol. 80, pp. 871, 936-954.

ERA's mandate that this contribution be recognized has been judicially[111] and legislatively[112] acknowledged in States that already have equal rights provisions in their constitutions. Such legal recognition is essential for homemakers to gain meaningful economic security during and after marriage; the ERA will give such legal recognition an anchor in the Federal Constitution for improving the status of homemakers in all States.

The ERA will accelerate legal recognition of modern marriage as a partnership in which marital property belongs to both spouses and the homemaker's contribution to the marriage is appreciated. It will also ensure that the persistent remnants of sex-biased property laws that severely disadvantage and restrict married women will be eliminated, and it will prohibit their reenactment by the Federal or State governments.

How Will the Equal Rights Amendment Affect Women and Children Facing Disruption of Their Families by Divorce?

There has been a rising rate of divorce in the United States over the past 20 years. The Bureau of the Census predicts that if the trend continues, almost 40 percent of all marriages will end in divorce.[113] This prospect is grim for men and women alike, but the reality it signals has its harshest effect upon women, especially those who accept the responsibility of being a full-time homemaker during part or all of the married years. By invalidating sex-based stereotypes and presumptions in family law and encouraging legal recognition that marriage is an economic as well as social and emotional partnership, the ERA will help women facing divorce by making the legal system operate more equitably.

Economic Survival: Support and Marital Property

Divorce has been recognized as a primary cause of poverty among women and children.[114] Studies document the differential effect of divorce on the economic status of men and women. Even fathers who pay child support are often better off financially after divorce than they were before.[115] In sharp contrast, many women and children face severe economic problems at the time of divorce.

- Sex-based presumptions have traditionally contributed to inequities when divorcing spouses divide their accumulated property, such as the house, household goods, and bank accounts. Such presumptions operate to disadvantage most severely the homemaker spouse. For example, under common law, it was presumed that household goods accumulated during the marriage and used by both spouses belonged to the husband only, unless the wife could demonstrate her financial contribution.[116] This presumption often operated to deprive the woman who contributed homemaking services rather than dollars to the marriage of the property she thought had been hers. Similarly, in some States today, the wife's services to her husband's business are presumed to be gratuitous; in these States courts will deny a wife's claims for property rights based on the time and effort she has contributed to her husband's business.[117]

The ERA would invalidate such presumptions and encourage recognition of the economic value of homemaker services, a result already accomplished in Pennsylvania under its State equal rights amendment.[118] Relying on the Pennsylvania ERA, the State's supreme court concluded that the common law presumption of "husband's ownership" of household goods could not survive constitutional scrutiny. This one-sided presumption, the court said, failed to acknowledge the equally important and often substantial nonmonetary contributions made by both spouses.[119] Even where the husband is the "sole provider," the court reasoned that the State's equal rights amendment requires recognition of the contribution of the homemaker wife and concluded that, in the absence of evidence to the contrary, it must be presumed that the property is held jointly.[120]

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[111] *See e.g.* DiFlorido v DiFlorido, 459 Pa. 641, 331 A 2d 174 (Pa. Sup Ct 1975)

[112] In Montana, for example, where an ERA is already part of the State constitution, the support law specifically states that each spouse must support the other to the extent each is able and that support includes the nonmonetary support provided by a spouse as homemaker. Mont Rev. Codes Ann §36-103 (Supp. 1977)

[113] U.S., Department of Commerce, Bureau of the Census, *Divorce, Child Custody and Child Support* (June 1979), p. 1 (hereafter cited as *Divorce, Child Custody and Child Support.*)

[114] Foundation for Child Development, *State of the Child: New York City II* (June 1980) pp. 45-46, 51-52; *see Divorce, Child Custody and Child Support,* pp. 4-5. Almost one third of all women receiving child support need public assistance. *Divorce, Child Custody and Child Support,* table 8, p. 14

[115] See David Chambers, *Making Fathers Pay: The Enforcement of Child Support* (Chicago: University of Chicago Press, 1979), p. 42-90; Saul Hoffman and John Holmes, "Husbands, Wives and Divorce," pp. 27, 31, in *Five Thousand American Families—Patterns of Economic Progress,* vol. IV, ed. G. Duncan and J. Morgan, Institute for Social Research, University of Michigan, (Ann Arbor, Michigan 1975). Although the studies show a decline in absolute income for divorced men, when income is considered on a per capita basis, their economic status often improves. Lenore Weitzman and Ruth Dixon, "The Alimony Myth: Does No-Fault Divorce Make a Difference?" *Family Law Quarterly* (1980), vol. XIV, pp. 172-78

[116] DiFlorido v. DiFlorido, 331 A 2d at 178, n.10

[117] See Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793, 796 (N.C. Sup. Ct. 1979) (wife denied property interest in husband's business even though she performed services for the business, which was capitalized out of money from their joint bank account; services of the wife to the husband or his business are presumed gratuitous)

[118] DiFlorido v. DiFlorido, 331 A 2d at 179

Thus, the Pennsylvania ERA has already resulted in establishing as a starting point in the division of household goods the presumption that the contributions of the homemaker and the spouse with a paying job are equal.[121]

• In addition to dividing accumulated marital property, divorcing spouses must determine their respective responsibilities for alimony and child support.[122] The Supreme Court of the United States already has established that statutes imposing different responsibilities in this area on the basis of sex are invalid under existing constitutional law.[123]

Consistent with this rule, many States have already, either through court decision or statute, revised their laws to provide for alimony or maintenance awards for a dependent spouse—regardless of whether the spouse is female or male.[124] However, few situations arise where such "sex-neutral" laws result in charging a woman with the support of her former husband, since the reality is that most husbands are not economically dependent on their wives. The rare cases where courts have found such dependency illustrate the fairness of the "mutual responsibility" doctrine.[125]

Some States have followed similar reasoning in changing laws that previously assigned child support duties to fathers only, solely on the basis of sex.[126] These States have determined that both parents have the duty to support their children.[127] By analyzing the facts on a case-by-case basis, the courts in these jurisdictions are in a position to assess the financial position of each parent and to award child support realistically.[128]

This gender neutrality will operate fairly, however, only if a value is placed on the contribution to child support made by the custodial parent, who is most often the mother. The way the ERA will promote this important safeguard for women is already seen in States that have added equal rights provisions to their constitutions.[129] While holding that the State ERA requires that both parents be obligated equally to support their children, these States are not interpreting such mutual responsibility as requiring mathematical equality in the monetary contribution of mother and father.[130] On the contrary, for example, one court in a State ERA jurisdiction held that courts need to consider the importance of the emotional contribution to a child's welfare provided by a nonworking custodial parent and not merely the potential monetary contribution that parent might provide if employed.[131]

By not automatically imposing a financial support burden on both spouses, these rulings have supported the continued provision of child rearing by custodial parents. In fact, one Pennsylvania court specifically held that permitting a nonworking parent to remain at home until the child matures does not violate that State's ERA.[132] Ratification of the Federal ERA would promote the uniform adoption of these principles in all jurisdictions, to the benefit of all families.

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[119] *Id.*

[120] *Id.* at 179, 180.

[121] Lower courts in Pennsylvania have begun to apply this rule to real property as well. See Bibighaus v. Bibighaus, 66 Del. 281, 288-90 (Delaware County, Del. 1979).

[122] Few divorced women are awarded alimony, and fewer still receive alimony payments. In 1978, only 14 percent of divorced women reported that they were awarded alimony; only two-thirds of those women actually received some payment, the amount averaging about $2,850. Only one-half of divorced and separated women with children under 21 were supposed to receive child support in 1978; only one-half of those mothers received the full amount of child support that had been awarded. Among all mothers who received some child support, the mean payment was $2,000. U.S., Department of Commerce, Bureau of the Census, *Child Support and Alimony: 1978* (advance report), p. 1, and table A, p. 3. There is no evidence that this represents any "new" trend: data collected by the Bureau of the Census indicate that only 9.3 percent of divorces between 1887 and 1906 included provisions for permanent alimony, as did 15.4 percent of divorces in 1916 and 14.6 percent of those in 1922. Weitzman and Dixon, "The Alimony Myth: Does No-Fault Divorce Make A Difference?" p. 180.

[123] Orr v. Orr, 440 U.S. 268 (1979). The Court reasoned that sex could not be used as a "proxy" for need and suggested that individualized hearings in which need for alimony could be established would better fulfill the State's objective of aiding the "needy spouse." *Id.* at 280-82. This result does not mean that all women are now or will be required to pay alimony to their husbands. Rather, as the Court suggested, trial courts will now evaluate the financial position of each spouse before making a determination of the amount, if any, of alimony one spouse will be ordered to pay the other. This determination will be made on a gender-neutral basis—the criteria being financial need, not sex. *Id.* at 282-83.

[124] *E.g.*, Ariz. Rev. Stat. Ann. §25-319 (1976); Fla. Stat. Ann. §61.08 (Supp. 1979); Ga. Code Ann. §30-209 (1969); Ill. Ann. Stat. ch. 40 §305 (Smith-Hurd Supp. 1980-81); N.J. Stat. Ann. §2A-34-23 (West Supp. 1980-81); N.C. Gen. Stat. §50-16.2 (1976); Okla. Stat. Ann. tit. 12 §1276 (West Supp. 1980-81).

[125] In Tignor v. Tignor, Div. No. 12601 (Md. Cir. Ct., Anne Arundel County, 1974), for example, the husband was awarded support from his wife when the marriage dissolved because he was blind and had relied on his wife's financial support during the marriage.

[126] *E.g.*, Ala. Code §30-2-31 (Supp. 1980); Fla. Stat. Ann. §61.13 (Supp. 1980); Minn. Stat. Ann. §518.17 (Supp. 1981); Conway v. Dana, 318 A.2d 324, 326 (Pa. 1974). *Cf.* McCrary v. McCrary, 599 P.2d 1248 (Utah 1979) (affirming trial court's decision modifying divorce decree to require former wife, rather than husband, to pay child support).

[127] *Id.*

[128] *E.g.*, Com. ex rel. Wasiolek v. Wasiolek, 380 A.2d 400, 403 (Pa. Super. Ct. 1977).

[129] See, for example, Rand v. Rand, 280 Md. 508, 374 A.2d 900 (Md. Ct. App. 1977); Conway v. Dana, 318 A.2d 324 (Pa. 1974); Krempp v. Krempp, 590 S.W. 2d 229 (Tex. Ct. Civ. App. 1979).

[130] *E.g.*, Rand v. Rand, 374 A.2d at 905 (parents share responsibility for parental support "in accordance with their respective financial resources"); Krempp v. Krempp, 590 S.W. 2d at 230 ("equality does not require that the courts . . . make equal the amount of financial contribution required of the spouses"). See *1978 ERA Statement*, pp. 24-25.

[131] Com. ex rel. Wasiolek v. Wasiolek, 380 A.2d 400.

Child Custody Determinations

In most States today, contested custody determinations are made on the basis of the "best interest of the child" and the fitness of the parent. The analysis of the child's best interest has traditionally been clouded by sex-based stereotypes that presumed that the mother was more fit to be the custodial parent than the father, especially when a child of "tender years" was involved. These sex-based presumptions are increasingly being rejected.[133]

However, sexual stereotypes still operate as factors in custody decisions in some States, such as Oklahoma, where the custody preference is for the mother when the child is of tender years and for the father when the child is old enough to require education and preparation for the world of work.[134] Sex-based stereotypes also intrude as the changing roles of men and women are viewed as inappropriate by the courts. For example, women who work outside the home or who attend school have been penalized for not conforming to a mother's "proper role."[135]

The ERA's clear rejection of sex-based stereotypes, and the importance of such a constitutional mandate to the courts, will provide a basis for arguing that such presumptions are invalid. Without such overbroad generalizations about a mother's and father's "proper role" to fall back upon, courts must meaningfully assess the respective households and, therefore, act more effectively in the best interests of the child.

The experience in States with equal rights provisions in their constitutions has demonstrated that such nonbiased custody determination mandated by the ERA neither requires nor has resulted in widespread denial of custody to mothers. In fact, the Colorado Supreme Court rejected the contention that Colorado's State ERA[136] was violated because a majority of women in divorce cases were granted custody.[137]

How Will the Equal Rights Amendment Affect Women Dependent on Pensions, Insurance, or Social Security?

Single women (those who never married or are now widowed or divorced) comprise almost three-fourths of our nation's elderly who are living in poverty.[138] One out of every three single women over the age of 65 has income below the poverty rate.[139] Unfortunately, the income protections for old age that individuals can secure from pensions, insurance plans, or social security are not always available to women. When they are, the costs are often higher or the benefits are lower for women than for men.

The ERA will strengthen the position of women seeking income protection by prohibiting sex-based discrimination in insurance, pensions, and retirement security programs that involve governmental action.

The Social Security System

Social security is our nation's principal program for providing income security when earnings are lost due to retirement, disability, or death.[140] Although over one-half of all social security recipients are women,[141] the program fails to provide equitable treatment or adequate protection for women.[142]

The debate surrounding passage and ratification of the ERA has helped to expose the effects of the social security system's perpetuation of employment discrimination and the way it operates to penalize women for motherhood and the time they spend as homemakers.

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[132] *Id.* at 403.

[133] See, *e.g.*, Del. Code Ann. tit. 13, §722 (1974); Mass. Gen. Laws Ann. ch. 208 §31 (West 1958); N.D. Cent. Code Ann. §14-09-06 (1971); Ore. Rev. Stat. §107.137 (1977).

[134] Okla. Stat. Ann. tit. 30 §11(2)(1976).

[135] A trial court in Iowa, for example, recently denied custody of her sons to a mother attending law school, concluding that the demands of study and the ability of the father to engage in various activities with the children required that the father be granted custody. The Iowa Supreme Court reversed, finding that the court's conclusions not only lacked evidential support, but that the court's award was improperly based, in part, on a stereotyped view of sexual roles that has no place in child custody adjudication. The Iowa Supreme Court found that it was in the children's best interest that they live with their mother. *In re Marriage of Linda Lou Tresnak and Emil James Tresnak*, Case No. 130/3997, slip op. (Iowa Sup. Ct., Sept. 17, 1980).

[136] Colorado State Constitution, Art. II, Sec. 29.

[137] *In re Marriage of Franks*, 542 P.2d 845, 852 (Colo. Sup. Ct. 1975).

[138] U.S., Department of Health, Education, and Welfare, *Social Security and the Changing Roles of Men and Women*, (February 1979), appendix C, p. 168 (hereafter cited as *Changing Roles*).

[139] One of every three single women over the age of 65 has income less than the poverty rate of $2,730 per year. Ibid., pp. 167–70.

[140] The Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified in scattered sections of 2, 26, 42, and 45 U.S.C.), as amended (1976 and Supp. III 1979). See, also, *Changing Roles*, p. 4.

[141] *Changing Roles*, p. 4.

[142] Ibid., pp. 10–12. Nearly 80 percent of all female beneficiaries receive less than $3,300 per year in social security payments; only 30 percent of male beneficiaries receive benefits below this level. Ibid., p. 23.

Full-time homemakers have never been accorded any independent social security coverage. The only benefits available for women who have not been employed in the labor force are derived from their husbands' work. The economic value of a woman's work as homemaker is ignored. If she becomes disabled, her family may not receive benefits in the same way it may when the wage earner becomes disabled.[143] Since she is not credited with any retirement benefits in her own right, her eligibility to receive social security is linked permanently to her husband's status, is limited to a ceiling of 50 percent of his basic benefits, and commences only after he retires.[144] If she experiences mandatory "retirement" because of widowhood or divorce, this total dependency is likely to leave her without adequate income in her old age and in some circumstances may leave her without any income at all.

If a homemaker is divorced, the most she can receive under social security is half of her former husband's benefits (while he receives 100 percent), hardly ever adequate to support her living alone.[145] If *he* chooses to work beyond retirement age, *she* must survive without any payments during that period.[146] If he chooses to retire early, her maximum benefits may be reduced.[147] If the marriage lasted less than 10 years, she would not even be eligible for these inadequate benefits.[148]

- A widowed homemaker is not entitled to any benefits at all until she reaches 60 years of age, unless she is still caring for minor children[149] or is at least 50 years of age *and* disabled.[150] The average monthly benefit received by disabled widows in 1978 [illegible] only $166—or $1,992 per year.[151] Since few w[illegible]s receive private pensions, the resulting poverty often is inescapable.[152]

The woman employed in the paid labor force must choose between taking benefits based on her own work history or as a dependent, based upon her husband's earnings.[153] Often because of the job segregation of women in lower paying jobs, women find that dependent benefits are higher than their own.[154] This problem is compounded by the fact that women who take time out of the paid labor force (or work part time) to provide child care and homemaking services for their families are penalized for motherhood, since their social security benefits are based on average lifetime earnings lower than those of men who work uninterrupted in the paid labor force. As a result, the average monthly benefit received by women retiring in November 1978 from work in the paid labor force was only $215, less than two-thirds of the average payment received by male retirees.[155] Many women, therefore, forfeit their own contributions, collecting dependency benefits instead. These women find themselves in the same vulnerable position as the woman who never worked in the paid work force.

These major inadequacies and inequities of the social security system—the burden of which falls most heavily on women—are due in large part to the sex-based assumptions underlying the program: that the family consists of one "individual breadwinner" (the husband) and "dependents" (the wife and children), and that dependents need (or have earned the right to) less income security than "individual breadwinners." These assumptions fail to recognize the value of work in the home and the discriminatory wage structure in the labor force. They also fail to reflect the diversity of family roles played by women today: some married women are lifetime homemakers; others are paid workers throughout their lives; still others play both roles during different times in the marriage; and many divorced and widowed women return to work after their marriages end.[156]

The U.S. Department of Health, Education, and Welfare issued a comprehensive report in 1979 with recommendations targeted at major reform of the system.[157] These proposals, and changes recommended by others,[158] reflect not only a rejection of the inherent unfairness of women forfeiting their own contributions to the system, but also a clear recognition of the economic as well as social value of the homemaker services.

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[143] 42 U.S.C. §423(c) (1976). See, also, Garrett v. Secretary of H.E.W., 397 F. Supp. 400 (D. Va. 1975); *Changing Roles*, pp. 11, 27–28.

[144] 42 U.S.C. §402(b)(2) (1976 and Supp. III 1979).

[145] *Id.* See also President's Commission on Pension Policy, *Working Women, Marriage and Retirement*, p. 6 (August 1980); *Changing Roles* pp. 23–24.

[146] 42 U.S.C. §403(b) (1976). See *Changing Roles*, p. 24.

[147] 42 U.S.C. §§402(q) (1976 and Supp. 1979).

[148] 42 U.S.C. §402(b)(1)(G) (Supp. III 1979). See, also, *Changing Roles*, p. 23.

[149] 42 U.S.C. §§402(e)(1)(B), 402(g) (1976 and Supp. III 1979). See also *Changing Roles*, p. 14.

[150] 42 U.S.C. §402(e)(1)(B) (1976).

[151] *Changing Roles*, p. 28.

[152] Ibid., p. 25.

[153] 42 U.S.C. §§402(a)(b)(1976). See also *Changing Roles*, pp. 4–5, 10.

[154] Ibid.

[155] *Changing Roles*, p. 10.

[156] Ibid., p. 1. Some of the inequities providing different dependency benefits to male and female dependents—but not all—have been eliminated. Ibid., pp. 14–19; President's Commission on Pension Policy, *Working Women, Marriage and Retirement*, Appendix A. (hereafter cited as *Working Women*.) But the more subtle and devastating discrimination against women in social security persists.

As discussed above, the ERA will provide a constitutional basis for urging recognition of the value of the homemaker's contribution to a marriage. Ratification will keep the pressure on Congress to adopt reform legislation designed to eliminate the social security system's inequitable treatment of women.

Pensions and Disability Insurance

Women often are not in a position to purchase disability insurance and pension plan coverage, since they are concentrated in homemaking, service, and clerical jobs[159] that usually are not accompanied by any insurance benefits program and have a low rate of pension coverage if available.[160] Federal law regulating private pensions allows provisions that result in a loss of benefits by women.[161] The discrimination women face in employment is thus perpetuated in retirement. As a result, men are twice as likely as women to be covered by pensions.[162]

Where coverage is available, many women are required to pay higher premiums than their male coworkers to acquire the same benefits,[163] thereby reducing their take-home pay; other women pay the same premium as male coworkers, but receive lower benefits.[164] These disparaties result from the calculation of insurance rates according to sex-based actuarial tables which show that women, on the average, live longer than men.[165] In some States the use of such tables is authorized by the government itself.[166] However, the justification for resulting discriminatory rates often is not supported by actual facts.[167] Because of practices such as these, women in the paid labor force and their families are forced to accept inferior coverage that makes their future economic security tenuous.[168]

The Supreme Court of the United States has held that the use of sex-based actuarial tables to compute premiums for retirement benefits provided by an employer to all employees violates Title VII's prohibition against sex discrimination in employment.[169] The Court found that charging women higher premiums because of statistics showing that women on the average live longer than men discriminated against women.[170] The Court suggested that other classifications more significantly linked to longevity—such as smoking, weight, or physical fitness—might be used more fairly than the employee's sex as a basis for determining rates.[171] The effect of this decision is limited, however, since it applies only to employer-operated insurance plans and not to policies taken by individuals with private insurance companies.[172] At least one Federal district court has already begun to cut back the potential effect of this decision by exempting certain employer plans from Title VII's coverage.[173] Further, it is not yet clear whether the discriminatory practice invalidated by the Court extends to unequal benefit levels.

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[157] *Changing Roles.*

[158] For example, legislation that would provide social security credits for individuals who perform homemaker services has been introduced in past Congresses. Ibid. p. 104.

[159] *The Employment of Women,* p. 7.

[160] Naomi Naierman and Ruth Brannon, "Sex Discrimination in Insurance," in U.S., Commission on Civil Rights, *Consultation on Discrimination Against Minorities and Women in Pensions and Health, Life and Disability Insurance* (April 1978) pp. 473–74 (hereafter cited as *Consultation on Discrimination in Pensions and Insurance).*

[161] For example, the Employee Retirement Income Security Act of 1974 (ERISA), which governs private pensions, permits employers to require an employee to work 10 years before being entitled to a pension and to work at least 1,000 hours in a year before entering a plan. 29 U.S.C. §§1052(a)(3)(A), 1053(a)(2)(A) (1976). This disadvantages women who enter and leave the work force to devote time to child-rearing responsibilities. *Working Women,* p. 37, appendix C, pp. 70–71.

[162] Ibid., p. 31.

[163] For example, one 1974 study demonstrated that women were charged premiums one and a half times higher than those charged to men in the same job classifications. Naierman and Brannon, "Sex Discrimination in Insurance," *Consultation on Discrimination in Pensions and Insurance,* p. 480. A complaint currently pending before the Insurance Commissioner of the Commonwealth of Pennsylvania challenges a disability insurance premium charge that is approximately 25 percent higher for female workers than it is for male employees receiving the same coverage. Starer v. Browne, Docket No. P80-8-11 (filed Aug. 14, 1980).

[164] A recent New York case involved a pension plan administered by the group that administers most of the pension plans covering university faculty in the United States. The challenged plan paid women benefits 10 percent lower than benefits paid to men. Spirt v. Teachers Insurance and Annuity Association, 475 F. Supp. 1298 (S.D. N.Y. 1979). See also EEOC v. Colby College, 18 E.P.D. ¶8734 (1st Cir., 1978); Peters v. Wayne State University, 21 E.P.D. ¶30,344 (D. Mich. 1979).

[165] Note, "Challenge to Sex-Based Mortality Tables in Insurance and Pensions," *Women's Rights Law Reporter* (Fall/Winter 1979–80), vol. 6, pp. 59–64.

[166] In inviting proposals for a pension plan to cover State employees, Missouri instructed bidders to list payout benefits and premium rates for males and females. Missouri, Deferred Compensation Commission, *Invitation for Proposals for the State of Missouri Deferred Compensation Plan for Public Employees* (May 1979). See also Mo. Rev. Stat. §104.330 (1969).

[167] In the area of health and disability insurance, for which women are charged higher premiums, there is evidence that women have shorter hospital stays than men. H. Denberg, "An Overview Report: Discrimination in the Insurance Marketplace and in the Insurance Business," *Consultation on Discrimination in Pensions and Insurance,* p. 271. A New York State Insurance Department study suggests that women's claim costs for accident-only benefits are lower than that of men at certain ages. New York State Insurance Department, *Disability Insurance Cost Differentials Between Men and Women.* (June 1976) (excerpted in *Consultation on Discrimination in Pensions and Insurance,* p. 565.)

[168] The pension benefits received by women are typically one-half of the amount of men's benefits. *Working Women,* p. 31.

[169] City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 710–11 (1978).

[170] *Id.* at 711. See "The Supreme Court, 1977 Term," *Harvard Law Review* (1978), vol. 92, pp. 299–301.

[171] See *City of Los Angeles,* 435 U.S. at 710.

The ERA will provide a basis for extending the Supreme Court's analysis to certain insurance and pension programs not covered by this Title VII ruling. It will prohibit sex-based discrimination in insurance wherever governmental action is involved.[174]

Pension Protection for Homemakers

Since the full-time homemaker typically is unable to secure adequate income protection from pension plans or social security, she is particularly vulnerable if she becomes divorced. Upon divorce, a homemaker may discover that she is not entitled to any portion of the pension benefits in the wage-earner's name, even though the pension was purchased with marital income. The Employee Retirement Income Security Act (ERISA), the Federal law governing private pension plans, makes no provision for the protection of the divorced wife's rights.[175] Since pensions are often the major marital asset, [illegible] consequences are serious

Women married to government employees fare no better. In fact, denial of pension benefits to divorced wives is imposed by Federal law in some retirement programs. The United States Supreme Court recently rejected a wife's claim to a portion of her husband's railroad retirement benefits, holding that the Federal program precludes division of these retirement benefits as marital property, even if such division is required by a State's marital property law.[176]

A similar claim is now before the Court regarding Federal military retirement pay.[177] The United States Government has taken the position that military retirement benefits are not divisible,[178] thereby denying to military wives a share of the pension they helped to build. The net result of such restrictions is that, upon divorce, many women are accorded no rights to share in the fruits of their joint labor, although they have spent their married lives building families and working toward a secure retirement, but were unable to earn pension credits in their own name.

Here again, by providing an impetus for recognizing the value of homemaker services, ratification of the ERA will encourage legislative action in this area to protect women in divorce.[179] The ERA will strengthen the view of pensions as marital property to which the homemaker spouse made a nonfinancial but nonetheless valuable contribution.

How Will the Equal Rights Amendment Affect Opportunities for Females in the Nation's Schools?

Evidence abounds that our Nation's public schools in many instances do not offer equal opportunities to females and males as students or as employees.[180] The Equal Rights Amendment will require public-supported schools at all levels to eliminate regulations and official practices that discriminate against females.[101] It will provide the constitutional basis for requiring public schools to eliminate the present effects of past purposeful discrimination. It will commit the country to the principle of equality so girls and boys can learn from the Constitution that they are considered equals before the law.

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[172] It has been noted, for example, that since the insurance industry is left free to discriminate and may therefore charge higher rates to employers who hire a large percentage of women, 435 U.S. at 717–18, a burden is placed on employers that may serve to undermine equal employment opportunity requirements. See Merton C. Bernstein and Lois G. Williams, "Sex Discrimination in Pensions: *Manhart's* Holding v. *Manhart's* Dictum," *Columbia Law Review* (1978), vol. 78, p. 1241.

[173] Spirt v. Teachers Insurance and Annuity Association, 475 F. Supp. 1298 (S.D.N.Y. 1979). The exempted plans were regulated under the McCarran-Ferguson Act, which preserves the power of the States to regulate the insurance field except in instances where the Federal Government explicity assumes control. 15 U.S.C.A. §§1011–1015 (1976).

[174] Under the Equal Rights Amendment, the concept of what constitutes government action in this area will be developed on a case-by-case basis. The insurance commissioner of Pennsylvania, relying in part upon the "strong policy of the State's ERA," has invalidated the use of sex-based actuarial data in computing auto insurance rates. In re Mattis v. Hartford Accident and Indemnity Company, Docket No. R78-7-2 (Apr. 17, 1980, unpublished). A similar claim challenging sex-based rates in disability insurance is now pending before Pennsylvania's insurance commissioner. See Starer v. Browne, Docket No. P80-8-11 (filed Aug. 14, 1980).

[175] 29 U.S.C. §1001–1381 (1976 and Supp. III 1979). See U.S., Department of Justice, *The Pension: American Pension System from the Viewpoint of the Average Woman*, p. 47 (1979). The divisibility of private pensions is a widely litigated issue. See, *e.g.*, Johnson v. Johnson, 5 F.L.R. 2045 (Ca. Ct. App. 1979); *cert. denied*, 48 U.S.L.W. 3452 (1980); General Dynamics Corp. v. Harris, 5 F.L.R. 2644 (Tx. Civ. App. 1979). See also Gill Ellen Bess, "Update: Division of ERISA Pensions and Other Benefit Plans, 6 F.L.R. 4001 (1979).

[176] Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

[177] McCarty v. McCarty, *rev. granted*, No. 80-5, 6 F.L.R. 2945 (October 21, 1980).

[178] Brief for certiorari for the United States as *Amicus Curiae* at 6, Cose v. Cose, No. 79-1469 (*pet. for cert. filed* Mar. 19, 1980).

[179] A recent reform measure amending the Foreign Service Act provides some rights to pension benefits for former spouses of Foreign Service personnel. Pub. L. No. 96-465, 94 Stat. 2079, 2102, 2113 (1980)(to be codified at 22 U.S.C. §4054). In addition, several similar measures, such as H.R. 2817 (Military Retirement Income Equity Act) and H.R. 2818 (Civil Service Retirement Income Equity Act), were introduced in the 96th Congress, but died without being passed.

[180] See generally President's Advisory Committee for Women, *Voices for Women* (Washington, D.C.: Government Printing Office, 1980) pp. 23–47; *1978 ERA Statement* pp. 14–16.

As students, boys and girls in public elementary and secondary schools continue to be steered into courses that reflect outmoded traditional stereotypes about a "man's world" and "women's work." Although this division is breaking down in the adult world, traditional ideas still survive regarding the suitability of school courses for boys and girls. Enrollment patterns of males and females in public vocational education continue to be overwhelmingly sex segregated.[102] In the city of Philadelphia, girls are precluded from attending an all-male public academic high school with superior science facilities.[103] Course materials used by students throughout the Nation reinforce the stereotypes about male and female roles.[104]

A number of Federal and State laws have been enacted to address gender-based inequities in educational institutions. Title IX of the Education Amendments of 1972 prohibits many forms of sex discrimination in federally funded schools.[105] The Federal Government also provides funds for affirmative efforts to encourage sex equity.[106] In several States as well, statutes expressly address the issue of educational equity,[107] or constitutional provisions may be relied upon to achieve sex equity in education.[108] But the extent of coverage varies widely. Title IX, for example, applies only to schools that accept Federal financial aid.[109] Its prohibition of sex-segregated admissions policies does not apply to public elementary or secondary schools,[110] and its prohibition of sex bias in athletics programs does not cover all sports.[111] Moreover, a Federal district court in Michigan recently held that Title IX did not extend to athletic teams that were not direct recipients of Federal financial assistance.[112] In some States—but not all—school admissions policies excluded from Title IX's nondiscrimination rule are subject to State laws prohibiting sex bias.[113] Few State and local educational agencies have funded programs to promote sex fairness.[114]

Where the provisions of Title IX do apply, serious implementation and enforcement problems limit the statute's effectiveness.[115] A school that refuses Federal dollars is not bound by Title IX's mandate for equality. Moreover, schools continue accepting Federal funds while not implementing the basic requirements of Title IX, encouraged by the weak record of Title IX enforcement.[116] The first set of regulations implementing Title IX was not promulgated until 1975, 3 years after the law was enacted.[117] Even then, schools were generously given until 1978 to come into compliance with the provisions concerning sex discrimination in athletics programs.[118] When many schools did not meet even this delayed compliance date, the Federal Government put a freeze on investigating complaints and promulgated a new policy interpretation at the end of 1979.[119] Investigation of a huge backlog of athletic complaints has just recently begun—8 years after Title IX became law.[300] The enforcement record to date is hardly an inducement to compliance.

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[101] *Senate ERA Report*, p. 17. The legislative history also makes clear that the ERA will *not* require that dormitories or bathrooms—in schools or anywhere else—be shared by men and women. Ib. 4.

[102] See Laurie Harrison and Peter Dahl, *Executive Summary of the Vocational Education Equity Study* (Palo Alto, Calif.: American Institutes for Research, 1979); American Civil Liberties Union Foundation of Georgia, Vocational Education Monitoring Project, *The Unfulfilled Promise of Vocational Education: A Look at Sex and Race Equity in Georgia* (1979).

[103] Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977). See Andrea Novick and David Griffiths, "Sex Segregated Public Schools: Vorchheimer v. School District of Philadelphia and The Judicial Definition of Equal Education for Women," *Women's Rights Law Reporter* (1978), vol. 4, p. 79.

[104] See Lenore J. Weitzman, *Sex Role Socialization* (New York: Mayfield Publishing Co., 1975); U.S., Commission on Civil Rights, *Characters in Textbooks: A Review of the Literature* (1980).

[105] 20 U.S.C. §1681–86 (1976).

[106] See, *e.g.*, 20 U.S.C. §§1866, 2301–2380 (1976 & Supp. III 1979).

[107] *E.g.*, Wash. Rev. Code Ann. §28A.85.010–900 (Supp. 1980–81); Mich. Comp. Laws Ann. Sec. 37.2401 (1976); N.J. Stat. Ann. §18A:36–20 (1973).

[108] Mass. Const. pt. 1, art. 1; Pa. Const. art. 1, §28.

[109] 20 U.S.C. §1681 (1976).

[110] *Id.*, §1681(a)(1).

[111] 45 C.F.R. §86.41 (1979).

[112] Othen v. Ann Arbor School Board, 502 F. Supp. — (E.D. Mich. Feb. 23, 1981).

[113] *E.g.*, Conn. Gen. Stat. Ann. §§10–15 (1975); Mass. Gen. Laws Ann. ch. 76, §5 (1972); Wis. Stat. Ann. §118.13 (1977) (prohibiting single sex public schools).

[114] President's Advisory Committee on Women, *Voices for Women*, p. 29.

[115] U.S., Commission on Civil Rights, *Enforcing Title IX* (October 1980).

[116] Ibid., pp. 2–3.

[117] 45 C.F.R. Part 86 (1975). Regulations promulgated by the Department of Health, Education, and Welfare (HEW) became effective June 4, 1975. See also *Now Legal Defense and Education Fund, Project on Equal Education Rights, Stalled at The Start* (Washington, D.C.: 1977). Other agencies with enforcement responsibilities still had no regulations more than 6 years after Title IX became law. See National Advisory Council on Women's Educational Programs, *The Unenforced Law: Title IX Activity by Federal Agencies Other Than HEW* (1978).

[118] U.S., Commission on Civil Rights, *More Hurdles to Clear* (1980), p. 33.

[119] 44 Fed. Reg. 71413 (Dec. 11, 1979).

In the meantime, sex-biased education practices such as athletic programs that might have survived Title IX scrutiny because of the statute's loopholes and poor enforcement record have been invalidated by Federal and State courts relying on the 14th amendment[301] and State ERAs.[302] But not all States have their own constitutional equal rights provisions, and the 14th amendment cannot be viewed as the solution to loopholes and enforcement difficulties under Title IX or other Federal or State statutory schemes. In addressing a 14th amendment challenge to a public school's sex-biased admissions policy, one district court judge complained:

> A lower court faced with [the Supreme Court's post-1970s] line of gender discrimination cases has an uncomfortable feeling, somewhat similar to a [player at] a shell game who is not absolutely sure there is a pea.[303]

The ERA will give courts a firm handle for deciding constitutional challenges to sex bias in public schools. Although the ERA will apply only to educational institutions where governmental action is involved, it does not incorporate the narrow prerequisite of Federal funding to trigger its application nor does it incorporate the loopholes of the various State and Federal statutory schemes. Thus, for example, educational programs that involve State or local action would be subject to the equality mandate of the ERA. It will be more secure than statutes that are subject to amendment.[304]

How Will the Equal Rights Amendment Affect Women in the Military?

Under the proposed Equal Rights Amendment, women will be assured the equal treatment in the military currently denied by the Federal Government. This discrimination creates serious barriers to educational and employment opportunities for women, jeopardizes the women who must serve in dangerous military situations without the training and support essential to effectiveness and survival, and perpetuates harmful, archaic, and overbroad stereotypes about the capabilities of women and the role of men and women in society.

More than 150,000 American women serve in the armed forces today,[305] carrying on the proud tradition of women in the military, a tradition that includes more than 350,000 women who served in the Second World War,[306] 200,000 of them under hostile fire.[307] Yet these women, who have been shown to be as efficient and effective as their male counterparts,[308] have suffered serious discrimination in their jobs.

The vocational and specialist job training available to women in the military has traditionally been severely restricted,[309] and a variety of limitations placed on women's participation in the armed services reduces the number of jobs to which women may be assigned. In 1977, 73 percent of all authorized military slots were closed to women entirely.[310] Although justified by the armed services as necessary because women are prohibited from combat, fully 30 percent of these restrictions were not combat related.[311]

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[300] See "U.S. to Act on Complaints of Bias in College Sports," *New York Times*, p. A-20, Aug. 11, 1980.

[301] E.g., Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wisc. 1978); Fortin v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975).

[302] See *1978 ERA Statement*, pp. 28–29.

[303] Vorchheimer v. School District of Philadelphia, 400 F. Supp. 326, 340–41 (E.D. Pa. 1975), *rev'd* 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977).

[304] Other civil rights laws, such as those affecting school desegregation, already have been weakened by amendments limiting enforcement that are attached to appropriations bills in order to circumvent usual legislative processes. See U.S., Commission on Civil Rights, *Civil Rights Update* (November 1980).

[305] Rostker v. Goldberg, Civ. No. 71-1480, slip op. at 30 (E.D. Pa. July 18, 1980), *stay granted*, —U.S.—, 101 S. Ct. 1 (July 19, 1980), *prob. juris. noted*, —U.S.—, 101 S. Ct. 563 (Dec. 1, 1980).

[306] U.S., Department of Defense, *Use of Women in the Military* (1977), p. 1 (hereafter cited as *Use of Women in the Military*).

[307] Although women serve in jobs such as nurses, truck drivers, radio operators, or technicians, which are classified as noncombatant, they have served and will continue to serve in combat environments. See Goodman, "Women, War and Equality: An Examination of Sex Discrimination in the Military," *Women's Rights Law Reporter* (1979), vol. 5, pp. [illegible]–259 (hereafter cited as "Women, War and Equality").

[308] One indication of their efficiency and effectiveness is the fact that women on active duty are being promoted at the same or higher rates than men. Overall retention rates for women are the same as men. *Use of Women in the Military*, pp. 7–8. The exercises tests conducted by the Department of Defense document that the field performance of men and women under normal conditions is equal. See U.S., Army Research Institute, *Women Content in Units Force Development Test* (MAX-WAC) I-23 (1977); *Women Content in the Army*, Reforger 77 (REF-WAC 77) I-4 (1978); "Women, War and Equality," pp. 256–57.

[309] Ibid., pp. 251–52.

[310] *Use of Women in the Military*, pp. 15–17. For example, "although only 6 percent of Army enlisted skills are closed to women, fully 42 percent of all *billets* filled by enlisted personnel in the Army are in specialties, skills, or units not available to women." [emphasis in original] U.S., Congress, Senate, S. Rep. No. 96-226, 96th Cong., 1st sess., 1979 p. 8.

[311] *Use of Women in the Military*, pp. 15–17; see "Women, War and Equality," pp. 251–52.

Discrimination in the military also results in the concentration of women in lower paying jobs.[212] Officer training programs are closed to women except in token numbers. Women in the military suffer discrimination in other ways as well. Some of the uniforms and equipment provided by the armed services for women fit so poorly "they constitute health and safety hazards and are inappropriate and nonfunctional."[213] Sexual harassment of female enlisted personnel is pandemic, encouraged by the discriminatory environment in the military that results from the gender-based regulations and restrictions.[214]

Access to the armed services is also restricted for women. Historically, women were limited by differential entrance requirements and by highly restrictive statutory quotas not solely related to combat requirements.[215] Despite the removal of some impediments,[216] women's enlistment is still limited by recruitment goals that operate as quotas.[217] Indeed, a Department of Defense study found there are more highly qualified women willing to enlist than are accepted now.[218] Because the military is the largest single vocational training institution in the Nation—offering on the job training at full pay and lifelong postservice benefits as well[219]—it has always been and continues to be an important route of upward mobility.[220] In addition, military pay for men and women is considerably higher than the average annual earnings of female high school graduates who work full-time year-round.[221] The women who are excluded are denied the practical and tangible benefits military service provides. The exclusion also denies the full citizenship and political rights historically intertwined with military service.[222] Thus, under the present system, women are seriously disadvantaged both in enlistment and once they are in the service.

The ERA will make illegal the gender bias that remains in the military, which currently limits opportunities for women and the contribution they can make to our Nation. It will require that the government allow men and women to be assigned and to serve on the basis of their skills and abilities and not on the basis of stereotypes and generalizations about their roles and capabilities.

The statutory prohibition against women serving on naval ships has already been invalidated under the equal protection component of the fifth amendment,[223] as has an all-male military draft registration plan.[224] In the draft registration case, *Rostker v. Goldberg*, which the United States Supreme Court has agreed to review,[225] the Government attempted to justify the exclusion of women by arguing that the presence of large numbers of women would hamper military flexibility in time of mobilization. Soundly rejecting this, the district court pointed to testimony by the Director of the Selective Service System and representatives of the Department of Defense that the inclusion of women in the pool of those eligible for induction would increase, not decrease, military flexibility.[226]

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[212] *Use of Women in the Military*, p. 7.

[213] U.S., Department of Defense, Advisory Committee on Women in the Services, "Spring Meeting Minutes," Recommendation no. 4, Field and Organizational Clothing, Apr. 1-5, 1979 (unpublished).

[214] U.S., Department of Defense, Advisory Committee on Women in the Services, "Spring Meeting Minutes," statement of Donald S. Gray, "Department of Defense Policy and Position on Sexual Harrassment," Washington, D.C., Apr. 21-25, 1980, pp. E-5-E-7 (unpublished); Hearing on Sexual Harrassment in the Military Before the Subcommittee on Military Personnel, House Armed Services Comm., 96th Cong., 2d sess. (Feb. 12, 1980).

[215] Women were restricted by statute to 2 percent of total enlistments in the armed forces until 1967. The Women's Armed Services Integration Act of 1948, Pub. L. No. 625, ch. 449, §102, 62 Stat. 357 (1948). Although this restriction was removed by Pub. L. No. 90-130, §1(9)(H), 81 Stat. 375 (1967), the representation of women in the armed services by 1985 is projected at only 12 percent. *Presidential Recommendations for Selective Service Reform: A Report to Congress Pursuant to Pub. L. No. 96-107* (Feb. 11, 1980), p. 42. See also *Use of Women in The Military*, p. 4; "Women, War, and Equality," p. 55.

[216] *Id.* See also Pub. L. No. 93-290, §§1, 2, 88 Stat. 173 (May 24, 1974).

[217] U.S., Congress, Senate, *D.O.D. Fiscal Year 1982 Authorization Request—U.S. Army Total Manpower*, Hearing before the Manpower and Personnel Subcommittee of the Armed Services Committee, 97th Cong., 1st sess., Feb. 26, 1981, testimony of William Clark, Acting Assistant Secretary for Manpower and Reserve Affairs (unpublished transcript).

[218] *Use of Women in the Military*, p. iii; Kathleen Carpenter, "Women in The Military and The Impact of The Equal Rights Amendment," testimony before the Illinois House Judiciary Committee, Apr. 30, 1980 (unpublished), p. 6.

[219] These benefits include loans and scholarships for education, insurance, health care, dependent benefits, and veterans preferences in public employment. See, *e.g.*, 5 U.S.C. §§3309 (1976)(employment); 38 U.S.C. §§610-628 (1976 and Supp. 1979) (medical and dental care); 38 U.S.C. §1802 (1976) (home loans). See, generally, Personnel Administration of Mass. v. Feeney, 442 U.S. 256, 261 at nn. 6, 7 (1979); "Women, War and Equality"), pp., 244-45.

[220] Ibid., p. 244.

[221] *Use of Women in the Military*, p. 21.

[222] "Women, War and Equality," p. 246-48. In Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), the conclusion that blacks could not be citizens of the United States was supported in part by the fact that they were excluded from the U.S. and State militias. *Id.* at 705; see "Women, War and Equality," p. 247.

[223] Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978).

[224] Rostker v. Goldberg, slip op.

[225] *Id.*, 101 S. Ct. 563.

[226] *Id.*, slip op. at 38-39. The court also stated, "The record reveals that in almost any conceivable military crisis the armed forces could utilize skills now almost entirely concentrated in the female population of the nation." *Id.* at 39.

In view of the current standard for scrutinizing sex-based classifications under existing constitutional law,[illegible] the steadily expanding utilization of women in the military,[illegible] the recognition that women in the military enhance our national defense,[illegible] and the fact that Congress has the power today to draft women, it is likely that the issue of the all-male draft will soon become moot.[illegible] The U.S. Supreme Court could establish this if it affirms the district court's decision in *Rostker v. Goldberg* that an all-male registration plan is invalid under the Constitution's equal protection clause. In any event, however, the application of the ERA is clear: women may not be excluded from the pool of individuals eligible for a military draft solely on the basis of gender.[illegible]

But neither the equal protection clause nor the ERA will require that all women become soldiers. The legislative history of the amendment makes clear that "the ERA will not require that all women serve in the military any more than all men are now required to serve."[illegible] Congressional exemptions for women and men who are physically or mentally unqualified, and deferments for individuals because of family or other responsibilities, would apply to women just as they have always applied to men.

> Thus the fear that mothers will be conscripted from the children into the military service if the equal rights amendment is ratified is *totally and completely unfounded. Congress will retain ample power to create legitimate sex-neutral exemptions from compulsory services.* For example, Congress might well exempt all parents of children under 18 from the draft. (emphasis added)[illegible]

With or without the ERA, women are sharing and will share with men the responsibility for military service. The determination of who will be called upon during wartime to bear the burden of military conscription and of actual combat duty will be made by Congress and the courts whether or not the ERA becomes a part of the Constitution. The ERA is needed to guarantee that women and men are accorded equal treatment and opportunity in the armed forces on the basis of their individual skills and abilities.

[illegible] See e.g. Craig v. Boren, 429 U.S. 190 (1976) (in [illegible] scrutiny, such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives").

[illegible] U.S., Department of Defense, *America's Volunteers—A Report on The All-Volunteer Armed Services*, pp. 69–71 (1978) (hereafter cited as *America's Volunteers*); Rostker v. Goldberg, slip op. at 33, n. 78.

[illegible] *America's Volunteers*, pp. 76, 182; Rostker v. Goldberg, slip op. at 41.

[illegible] See Carpenter, "Women in the Military."

[illegible] *Senate ERA Report*, p. 13.

[illegible] Ibid.

[illegible] Ibid.

DISSENTING VIEWS OF HOUSE JOINT RESOLUTION 1 PROPOSED EQUAL RIGHTS AMENDMENT of Hyde, Sawyer, McCollum, DeWine

While registering my dissent to the Equal Rights Amendment itself, I strongly dissent to the filing of the House Judiciary Committee's report on this resolution. H.J. Res. 1 is a constitutional amendment and represents the single most important piece of legislation that the Judiciary Committee will consider during the 98th Congress. Yet, some Members were not afforded the opportunity of determining whether the Committee report is in conformity or in conflict with the Judiciary Committee markup because they were not permitted to read the report prior to its being filed. Adequate review is critically important when one considers the debate on the standard of review and the intent of the House Judiciary Committee with respect to those amendments that were defeated, as well as the thrust of the arguments of those supporters of an unamended Equal Rights Amendment. Furthermore, we were not assured in full Committee that the ERA would be considered under an open rule. For a constitutional amendment to be considered under any other procedure would be an outrage.

If the arguments of the ERA are so strong, then it is inconceivable why all Members of the Judiciary Committee were not permitted to examine the report accompanying H.J. Res. 1.

The Chairman of the House Judiciary Subcommittee on Civil and Constitutional Rights, in objecting to the Committee report being circulated to all Members one day before it is filed is certainly not being fair. After all, we are dealing with a constitutional amendment with far-reaching implications. If ratified, the Federal judiciary will look to the report for guidance on how to construe the ERA. At least in the instance of H.J. Res. 1, the courts will have the opportunity to review the full Committee transcript on the markup of this resolution as a unanimous consent request was agreed to that "the full Committee transcript on House Joint Resolution 1 be made an *official record to be published for purposes of legislative history*." [Emphasis added.]

These dissenting views are an attempt to deal with the Equal Rights Amendment fairly. The undersigned Member is a strong supporter of equality of rights for women. I also feel very strongly that a constitutional amendment is a very serious undertaking. The issues raised in these dissenting views are the foreseeable issues that will be addressed by the courts if the ERA is approved by the Congress and ratified by the States. The ERA's impact of many of these issues is unknown. We can only speculate, as all the clarifying amendments were voted down and the remarks made in the full Judiciary Committee have made the legislative history more confused.

As a legislator who has taken the oath of office to uphold the Constitution of the United States, I feel an obligation to define for the courts how the ERA is to be applied in controversial areas that will in time be the subject of litigation if the ERA is ratified as the Twenty-seventh Amendment to the Constitution.

As we all know, the first submission of the Equal Rights Amendment (ERA I) failed to be ratified by 38 State legislatures during the unprecedented extension of time for ratification granted by the Congress in 1978. In fact, from 1974 to 1982, only two States voted to ratify the proposed amendment.

This failure was a direct result of the amendment's proponents inability to answer critical questions on the many emotional and social issues it raised.

These included questions as to whether the ERA would require taxpayer funding of non-elective abortions as has been argued in several States where the ERA is a part of a State's constitution; whether ERA will strengthen abortion rights; whether the legal standard of review for the ERA will be an absolute standard, as has been argued by many ERA proponents, or will it be the same standard that exists for race classifications; whether women would be drafted into the military, if Congress should decide at some future time to reinstate conscription; whether women would be assigned combat roles; and whether homosexual marriages would be legalized—to name but a few.

Additionally, new questions have arisen as to whether single-sex schools would be eradicated; whether a church that treats women unequally, i.e., by not having women priests, rabbis or ministers, would have its tax-exempt status revoked—these are important questions in light of the *Bob Jones* decision. Also questions arise as to whether the ERA would overturn veterans preference programs, a suggestion that was made in written testimony this year by Dorothy Ridings, President of the League of Women Voters have arisen.

Finally, it is unclear whether the ERA would actually affect certain economic areas as has been suggested by ERA proponents.

I was very disappointed by many of the witnesses who were either unknowledgeable or did not want to give the Subcommittee the benefit of their positions. For example, Jeanne Atkins, staff lawyer for the Women's Equity Action League, who testified on the legal implications of the ERA on women in the military, was unable to proffer a view on the standard of review. The standard of review is the most important question one has to consider when gauging the ERA's effect on the military. Governor Lamm of Colorado, who testified on all the positions of the ERA in the State of Colorado and the unknown impact on women, was unable to answer a question on whether the wage gap had narrowed in the last 10 years since the ERA became part of the Colorado State Constitution in 1973. Two panels of pro-ERA witnesses were also unable to answer similar questions posed to them on the effect of State ERA's on the wage gap several months later. Dorothy Ridings, President of the League of Women Voters, who, in her written testimony, stated that the ERA would overrule the Supreme Court decision of *Massachusetts v. Feeney*, which upheld veterans perference in Massachusetts, was unable to state what the effect of the ERA on the federal veterans perference programs would be. Kathy Wilson, National Chairperson of the National Womens Political Caucus, was unable to answer questions concerning whether the ERA would invalidate the property and domestic relations statutes in States that did not have community property statutes on the books if and when the ERA is ratified. This question was posed after she made statements highly critical of the English common law system "which provided the foundation for marital property laws." It was like pulling teeth to get some of the pro-ERA witnesses to take a position as to whether the ERA would affect abortion rights or funding of non-therapeutic abortions. When the answers were given it was evident why—some said yes, some said no, some did not know.

The foregoing are mentioned to show that even after the more than 12 years of long, arduous debate on the meaning of the text of the ERA, it is still far from clear what it would mean and do.

As elected officials, we should be wary of abdicating our legislative function to the courts. This is especially important because the hearing process has further clouded the already confused legislative history. I say confused because never before has our country gone through the process of constitutional amendment where the amendment was approved by the Congress, rejected by the States, and subsequently approved by Congress again and resubmitted to the States.

In the full Committee markup of H.J. Res. 1, I was disappointed at the convoluted responses that were given by ERA proponents on questions regarding the standard of review, its effect on abortion rights, the draft, combat, private and parochial schools, and so on.

It is clear that the nagging questions which led the ERA to defeat are still unanswered, and new ones have arisen. It is in the context of the murky, clouded and often opaque meaning of the ERA that these dissenting views have been written. We owe a responsibility to the courts and to the States as to what the ERA means or does not mean.

The first portion of these dissenting views will deal with what effect the ERA will have on certain economic issues such as the wage gap and insurance. The focus will then be directed to the standard of review that sex discrimination cases will utilize, and whether the ERA will affect veterans perferences, abortion rights, public and private education, and women in the armed services.

EMPLOYMENT

It is argued that the ERA will mandate "equal pay for equal work." This is not necessarily true, as the constitutional amendment contained in H.J. Res. 1—by its own terms—only affects State action and cannot affect discrimination by private employers.

Additionally, there are already strong statutes in place that make it illegal for sex discrimination in both private and public employment. For example, Title VII of the Civil Rights Act of 1964, as amended, makes discrimination based on sex in public and private employment unlawful in the areas of hiring, firing, promotions, wages, classifications, referrals, assignments, use of facilities, training, apprenticeships, fringe benefits (including medical and maternity benefits, life insurance, pensions and retirement), and any other privileges of employment.

Title VII has been vigorously enforced to strike down unlawful sex discrimination in many areas. In testimony before the Subcommittee on Civil and Constitutional Rights, Carl C. Hoffman, Ph.D., an expert in the field of employment discrimination, testified that:

"From all the research that I have done, I can find no reason to believe that passage of the Equal Rights Amendment will eliminate the income differentials or the sex segregation in occupations which currently exist. In terms of policymaking, I do not believe it will have the effect many proponents of the Equal Rights Amendment say it will.

"I also strongly question whether we need an Equal Rights amendment, especially with respect to employment discrimination."

Hoffman refutes the conclusion of some experts that the current laws are inadequate to solve the problem of sex discrimination.

"The results of much of my work argue rather that the mechanisms causing the differences in income between men and women are of a different type than those that caused the differences in income between men and women blacks and whites. Specifically, I have found that the career choices, the socializations of women and most importantly the structure of women's lives prevent them from following through on careers to the same extent as men."

Hoffman concluded his testimony by voicing his concern that the courts would be the ones deciding what is and what is not discrimination:

"One of my fears about the Equal Rights Amendment is that it is a symbolic issue, and its passage would relieve Congress and the Administration of much of the motivation to change discriminatory laws and to enforce already existing laws that prohibit discrimination.

"I would hate to see the substantive changes in the law dictated by the Federal Courts, because I believe the issues are of such a complex nature that they require a great deal of study, and legislative rather than judicial action. I would hate to see the primary motivator of Congress, to study these complex issues and to make these hard choices, removed simply by passage of the Equal Rights Amendment, which may be redundant and unnecessary."

Grover Rees, Assistant Professor of Law at the University of Texas Law School, testified that:

"Indeed, if the ERA cannot reach private employment discrimination, then some of the most powerful arguments that have been made on its behalf amount to false advertising. And if it can reach private employment, then important questions are raised about what other kinds of non-governmental conduct will be illegalized by the amendment."

In addition to the legal arguments that can be made as to the scope of the ERA, the track record of State ERAs show there has been little if any effect on the "wage gap" in States that have enacted State ERAs in their constitutions, as opposed to States that have not.

In testimony before the Subcommittee, Mrs. Judith Finn, an expert in the area, provided strong arguements favoring the proposition that the ERA will not reduce the pay gap. She said:

"I understand that Governor Lamm of Colorado appeared before this committee and told of the benefits to women that have resulted form the passage in his state of the state ERA. He said, for example, that the proportion of women in the labor force has increased and women are better off economically in Colorado since its ERA was passed. I have looked at the pay gap in the states that have passed state ERAs and I find no evidence that it differs significantly from the pay gap in states that do not have ERAs. In Colorado, for example, the median earnings for women employed full-time, year round in 1980 was 60.2 percent of the median earnings of Colorado males, as reported in the recently published statistics from the 1980 Census. This is indistinguishable from the national average in 1980. The Colorado ERA which has language similar to Section 1 of the proposed Federal ERA was passed in 1972. If at least 50 percent of the pay gap is due to sex discrimination as proponents argue, and if an ERA could be counted on to reduce sex discrimination and thus the pay gap, isn't it time that the proponents explain the failure of the state ERAs to substantially reduce the pay gap? Perhaps the results take more time. Perhaps we should then wait until we have the 1990 census to reevaluate these claims about what ERA can do about the pay gap."

Footnote 31 of Mrs. Finn's testimony before the Subcommittee graphically illustrates that the wage gap has not tightened in ERA versus non ERA states:

"At this time the 1980 Census data on earnings by sex are not available for all states. Census data are available for four of the six states with state ERAs with language similar to the proposed Federal ERA. Besides Colorado these include New Mexico, Maryland, and Hawaii. The ratios of female/male median earnings reported for these states are .60 in Colorado, .56 in New Mexico, .62 in Maryland, and .60 in Hawaii. for these four states combined the unweighted average is .62, and the weighted average is .615. The comparable national average is not yet published by the Census Bureau but has been estimated by the Bureau to be about .60 in 1980, increasing to .62 in 1983. See Robert Pear 'Earnings Gap Narrows Slightly Between Women and Men, U.S. Reports,' *New York Times*, October 3, 1983 and U.S. Department of Commerce, Bureau of Census, *1980 Census of Population*, 'Economic and Social Characteristics,' (Separate volume for each state), Table 71, U.S. GPO, Washington, D.C., 1983."

Thus, it has not been clearly demonstrated how the ERA will affect employment. In fact, it appers that it will have little, if any effect.

INSURANCE

"As a constitutional ban on sex discriminatory laws, the Equal Rights Amendment will outlaw, or support legal challenges to end, sex discriminatory price and payout abuses by insurers, employers, and government. . . ."

This far-reaching statement was made by Judy Goldsmith, President of the National Organization of Women (NOW), when she testified before the House Judiciary Subcommittee on Civil and Constitutional Rights on September 14, 1983.

Every witness who commented on unisex insurance agreed it would be mandated by the ERA. The question arises as to whether unisex insurance is a benefit or a detriment to the women and men of our society.

Currently, the setting of insurance rates is left to state governments, and several states have enacted insurance statutes requiring unisex insurance. In Michigan, according to statistics compiled by the Michigan Insurance Bureau, the experience has been a massive increase in rates for young single women and young married women.

The rate increase for young single women ranged from 13% to 137%. Unisex insurance rates, which would be required by the ERA, represent an artifical rigging of the insurance market against young women. It inflicts unnecessary and severe economic penalties against the very class of persons it is designed to protect—women, especially young women, who, according to casualty tables of insurance companies, represent a low-risk category of individuals.

Both the hearing record and the markup featured an excerpt of a letter submitted by a victim of Michigan's Essential Insurance Act. To Kim Dove, this new law meant, "despite a near perfect driving record, an increase in insurance rates from $134 per year to $305 per year." Because Kim Dove could not afford the insurance, she was forced to settle for minimum coverage with a high-risk company. In her letter she asks the question:

"Who is going to take care of my family and pay the bills if I should have a serious accident with this kind of minimum coverage? The answer is—no one."

In testimony presented to the Subcommittee by Mr. Paul Barnhart, an independent consulting actuary, it was stated:

"A grave change of the Equal Rights Amendment is that it may establish an artificial, forced 'equality' in areas where fairness and common sense must prevail if the economic interests of women are to be safeguarded. In the field of private voluntary insurance, 'equality' must be tempered and interpreted in the context of *fairness*, or women will suffer, in many instances *severely* and *unjustly*."

We should be very careful about not making women victims of the Equal Rights Amendment while supposedly protecting their economic rights. In Committee, an amendment was offered by the gentleman from Michigan, Mr. Sawyer, to allow sex-based classifications to be used by insurers. Unfortunately, it was defeated. If adopted, it would have gone a long way toward resolving this important issue.

STANDARD OF REVIEW

Perhaps the most important question that has to be answered about the Equal Rights Amendment centers around the standard of review the courts will use when presented with a case of a sex-based classification.

Under the Fourteenth Amendment's due process clause, a classification will be upheld in most instances if there is a rational basis for the classification. This is known as the rational basis test. However, if the classification is based on race, religion or national origin (suspect classifications), the court will apply the standard of "strict judicial scrutiny" to determine if there is a "compelling State interest" for the classification.

Sex has not been held to be a "suspect classification" where "strict judicial scrutiny" will apply. The closest the Supreme Court ever came to denoting sex to a suspect classification was the case of "*Frontiero v. Richardson*, 411 U.S. 677, where four Supreme Court Justices argued that sex should be a suspect classification. On the other hand, the very liberal "rational basis test" was long ago relegated to the dust heap of history regarding sex classifications. Instead, the standard of review for a sex classification is currently somewhere in between rational basis and strict judicial scrutiny.

The *Frontiero* case was replaced in 1976 by the standard articulated in *Craig v. Boren*, 429 U.S. 190 (1976), where it was stated that a sex classification will be struck down unless it is "substantially related to the achievement of important government objectives." It was held that Oklahoma's 3.2% beer statute (which prohibits the sale of "non-intoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18) was held to invidiously discriminate against males 18-20 years of age.

In a more recent case, the U.S. Supreme Court struck down as a violation of the Equal Protection Clause of the Fourteenth Amendment the policy of the Mississippi University for Women of denying qualified males the right to enroll for credit in its school of nursing. In writing for the majority, Associate Supreme Court Justice Sandra Day O'Connor, in *Mississippi University for Women v. Hogan*, 458 U.S. 1014 (1982), articulated the "exceedingly persuasive justification" for gender-based classifications:

"Thus considering both the asserted interest (educational affirmative action for women in the field of nursing) and the relationship between the interest and the methods used by the State, we conclude that the State has fallen far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification."

As time goes on, the standard of review for sex-based classifications will continue to move away from this intermediate standard of review toward strict judicial scrutiny.

The standard of review for the ERA is unclear. Both the hearing record and the official record of the House Judiciary Committee markup of H.J. Res. 1, held on November 9, 1983, is replete with differing views as to what is the standard of review under the ERA. Instead, it proved that the proponents of the ERA clearly do not know what the 52-word constitutional amendment means. Professor Anne Freedman of Rutgers University Law School, who co-authored an extensive thesis on the ERA which was cited by Congress when it was considered in 1971-72, testified that "under the ERA, the government would be prohibited from classifying on the basis of sex, except in those rare circumstances where such classifications are used to protect the constitutional right to privacy or to prevent past discrimination to be remedied . . ." [suggests that affirmative action programs would be constitutional].

Professor Thomas Emerson of Yale University Law School, also a co-author of this article, testified before the Civil and Constitutional Rights Subcommittee "that if the ERA is to achieve its goal [it] must start with the proposition that classification by sex is outlawed. . . ." He then retreated significantly from that statement by arguing that the ERA includes an exemption for certain physicial differences between the sexes and for the right to privacy, and that the ERA would not supersede "certain other rights". Nowhere in the ERA are these exceptions articulated.

In the *Yale Law Review* article (80 Yale Law Journal 871 (1971)), both Professors Emerson and Freedman argued that "the constitutional mandate must be absolute."

The staff attorney for the womens Equity Action League (WEAL) mentioned several different standards for military classification. Ms. Atkins first stated that "all explicit gender-based exclusions . . . [i.e.] the express exclusionary policies of the services, and the gender-based Selective Service . . . would fall." [This seems to suggest an absotute standard.] She goes on to state that: "Moreover, any practices based on physical characteristics unique to one sex would have to be justified by a showing that the need was compelling." [This suggests strict scrutiny.] Finally, she states that "to the extent that such gender-neutral intent might disproportionately exclude women from participation, these criteria would be subject to rigorous examination." [This suggest a third standard.] In her oral testimony a fourth standard—a "sensible standard"—is suggested.

As noted previously, Mary Frances Berry stated that the standard of review for the ERA would be similar to that for racial discrimination. Former Congressman Charles E. Wiggins, in his testimony before the Subcommittee, suggested that "that is a serious risk that it [ERA] will be construed as adopting an absolute standard against classifications based on sex, except where unique physical characteristics are properly involved, and that exceptions will be subject to strict scrutiny. "This construction . . . is the critical vice of the amendment. . . ." Thus, the standard of review for sex classification would be more stringently applied than the current one for race that exists under the equal protection clause of the Fourteenth Amendment. Mr. Wiggins further testified that the language of the ERA is absolute, that the standard of review for sex discrimination under the ERA is a higher one than currently exists for race under the Fourteenth Amendment. Mr. Wiggins noted that under either standard of review for the ERA, whether strict judicial scrutiny or absolute, that the Hyde Amendment and similar amendments at the state level that prohibit federal funds from being used for abortions, would probably be invalidated.

When the ERA was considered by the Judiciary Committee, there was a bipartisan effort to more clearly define the scope of the Equal Rights Amendment through amendments. All of these amendments were voted down. However, in the debate on these amendments, it became clear that the supporters of the ERA could not articulate what the standard of review would be for sex classification.

In the area of the impact of the ERA on abortion, the Judiciary committee was assured by various opponents of the Sensenbrenner amendment (which, if adopted, would have made the ERA abortion-neutral) that it was unnecessary because the ERA already did not affect abortion rights. It was asserted that abortion issues including the legality of the Hyde amendment would continue to be decided under the privacy penumbra. In the next breath, however, the Chairman of the Subcommittee on Civil and constitutional rights stated the standard of review for pregnancy classifications would be strict judicial scrutiny. There was much testimony and legal analysis done that indicated if the test for a pregnancy classification is strict judicial scrutiny (which the proponents say it is), and if an abortion classification is a pregnancy classification (which proponents say it is), then the Supreme Court case of *Harris v. McRae*, 448 U.S. 297 (1980), which upheld the Hyde amendment, would be overturned.

Regarding the effect of the ERA on parochial private schools, the various statements were made which showed a lack of understanding of how the standard of review would affect the impact of the ERA.

For example, on the one hand, it was argued by one proponent that strict judicial scrutiny would apply to private and parochial schools. However, it was emphasized that sex classification and race classification would have to be treated differently. Thus, it is unclear as to whether the "strict judicial scrutiny" test which is applied to racial classification will be the same "strict judicial scrutiny test" to be applied to sex based classifications if the ERA is ratified.

In the area of veterans preference, it was mentioned in the markup that the standard of review would be whether veterans preference programs could serve legitimate legislative goals if targeted to people who were involuntarily withdrawn to serve their country. One would look at the legislative reasoning when veterans preference statutes were adopted. If there is a rational reason, then the statute would be upheld. This seems to suggest a rational basis test. In the next breath, a strict judicial scrutiny test was said to apply.

We do not think anyone really knows how the ERA will affect veterans preferences.

The question of the standard of review for the ERA is clearly one that needs to be addressed. The Judiciary Committee markup and hearing record certainly do not provide much guidance as to the standard of review for the ERA on issues relating to abortion, the military, private and parochial schools, veterans preference, etc. Unless this is clearly articulated, the controversy will continue to rage over the effect of the ERA on sex-based classifications in our society. The answers will continue to be either "I don't know" or, as the chief sponsor of the ERA in the other body would say "the courts will decide."

VETERANS PREFERENCE

". . . the broad veterans preference statute challenged in *Massachusetts v. Feeney* (442 U.S. 256) which granted an absolute preference to veterans seeking public employment in the Massachusetts civil service would fall in a challenge under the ERA."

This statement was made by Dorothy Ridings, President of the League of Women Voters, after she criticizes "rules and policies . . . which have a disproportionately negative effect on women . . . and perpetuate the occupational segregation that isolates women into a few occupations with lower status and pay."

The proponents of the amendment (See, e.g., the testimony of Professor Freedman), tell us that facially neutral statutes having a disparate impact on one sex will be subjected to strict judicial scrutiny. The Massachusetts statute, upheld in *Feeney*, will fall under this judicial analysis. What we do not know is this: what other veterans' preference programs will also fall?

If the veterans preference program in *Massachusetts v. Feeney* would fall, then veterans preference programs that exist at the Federal and State levels in employment, education, loan acquisitions, and so on, would be subject to challenge. Veterans preference programs were enacted to help veterans get back in the mainstream of society after giving service to our country. Veterans did not get rich in World War II, the Korean War, or during the Vietnam era; their monthly pay was an average of $78 in 1944, $144 in 1952, and $193 in 1968. It is unfortunate that the ERA movement has singled out to destroy the rights of those persons who risked their lives for our country in the name of equality.

ABORTION

The impact of the ERA on one of the most controversial social and moral issues of our time—abortion—is unclear. That the ERA will be used to buttress and amplify the right to abortion is crystal clear. This intent has already been demonstrated by abortion advocates in three States that have, in their State constitutions, language that closely tracks the proposed federal Equal Rights Amendment. These States also had or have restrictions that prohibit State monies from being used for abortion purposes. These States are Hawaii, Massachusetts, and Pennsylvania.

In 1980, the Civil Liberties Union of Massachusetts (CLUM) in *Moe v. King*, S. Judicial Court of Mass, Civil No. 80-298 (filed July 9, 1980), argued that State refusal to fund abortions violated the Massachusetts Equal Rights Amendment:

"By singling out for special treatment and effectively excluding from coverage an operation which is unique to women, while including without comparable limitation a wide range of other operations, including those which are unique to men, the statutes [prohibiting state funding of abortions] constitute discrimination on the basis of sex, a violation of the Massachusetts Equal Rights Amendment."

CLUM justified the lawsuit in the following way when its executive director stated:

"Because a strong coalition is being forged between the anti-ERA coalition and the anti-abortion people, it was our hope to be able to save Medicaid payments for medically necessary abortions through the federal court route without having to use the State Equal Rights Amendment and possibly fuel the national anti-ERA movement. But the loss in McRae was the last straw. We now have no recourse but to turn to the State constitutions for the legal tools to save Medicaid funding for abortions."

In *Hawaii Right to Life v. Chang* (Memorandum in Support of Motion to Intervene, Circuit Court of the First Circuit, State of Hawaii, Civil No. 53567 (filed May 11, 1978)), the ACLU argued on behalf of several doctors that:

"Applicants' first claim to reimbursement as a matter of right rests on the Hawaii Constitution's guarantees of due process and Equal Protection and Article I, Sec. 21, which provides that 'equality of rights under the law shall not be denied or abridged by the State on account of sex.' Abortion is a medical procedure performed only for women; withdrawing funding for abortions while continuing to reimburse other medical procedures sought by both sexes or only by men would be tantamount to a denial of equal rights on account of sex."

In both of these cases, the court did not address the equal rights requirement in making its decision.

In the third case of *Fischer, et al. v. Commonwealth of Pennsylvania Department of Public Welfare*, the American Civil Liberties Foundation of Pennsylvania argued that:

"Pregnancy is unique to women. 62 P.S. § 453 and 18 Pa. C.S.A. § 3215(c), which expressly denies benefits for health problems arising out of pregnancy, discriminates against women recipients because of their sex. 62 P.S. § 453, and 18 Pa. C.S.A. § 3215(c) and the regulations issued pursuant thereto constitute a gender-based classification in violation of the Pennsylvania Equal Rights Amendment, Article I, Section 28, of the Pennsylvania Constitution."

Admittedly, there is no court ruling on the merits but it is clear that the ERA will be an arrow in the quiver of the pro-abortion movement in their attempts to expand abortion rights.

It has been argued and testified to by proponents of the ERA that the ERA will have no impact on abortion or abortion funding because pregnancy is a unique physical characteristic shared only by one sex and would not be an issue for sex discrimination.

However, in an amicus brief filed in the *General Electric v. Gilbert* case, 429 U.S. 125 (1976), by the leading legal scholars who favor the ERA, it was argued that pregnancy was no different than any other temporary disability. The issue in the *Gilbert* case was whether a disability insurance coverage program offered by General Electric, which included pregnancy coverage, was discrimination and thus in violation of Title VII of the 1964 Civil Rights Act, which prohibits sex discrimination in employment.

The amicus brief filed by the ACLU and the Women's Law Project was signed by Professor Thomas Emerson of Yale Law School and Professor Anne Freedman of Rutgers University School of Law, both of whom testified before the Subcommittee on Civil and Constitutional Rights in favor of the ERA. It was stated that:

". . . In line with the central tenet of the ERA—that legal support for sex discrimination is to be eradicated root and branch—Congress clearly intended the amendment to end all categorical discrimination by law, including the improper use of pregnancy-based classification.

". . . The condition of pregnancy, for example, possesses a number of properties, some of them shared by other conditions (need for medical care, period of disability), and some, wholly unique (the birth of a child is the usual result). The uterus, too, shares some characteristics with other organs (subject to disease and malfunction), and some features wholly unique to it . . . ."

If General Electric were a State employer subject to the ERA, "its treatment of disability related to pregnancy and childbirth would not survive scrutiny appropriate under the amendment." (*Id.*) Thus, if this treatment of a "disability related to pregnancy" would not "survive scrutiny" under the Equal Rights Amendment, it is doubtful that an abortion classification—necessarily related to pregnancy, of course—could withstand the constitutional scrutiny required by ERA.

In testimony before the Subcommittee on Civil and Constitutional Rights, the American Bar Association was very critical of the U.S. Supreme Court's decision in the *Gilbert* case:

"The Supreme Court reasoned . . . that different treatment of pregnancy from other disabilities is not discrimination based on sex but simply discrimination based on pregnancy. Accordingly, a legislature can distinguish between pregnant and non-pregnant people and perpetrate no legal wrong against women. This denial of the obvious fact that to treat people differently on account of characteristics unique to one sex is to treat them differently on the basis of their sex places beyond reach of the equal protection clause some of the most invidious and detrimental sex role stereotyping."

It takes little imagination to see that legislative restrictions on public monies being used for abortions are clearly within the reach of what Professors Emerson and Freedman, and the ABA would like to see prohibited.

If the Supreme Court were to construe a prohibition on Federal funding as a sex-based classification, the Hyde Amendment or a similar State prohibiton on abortion would be subject to a strong constitutional challenge under the ERA. Professor Freedman testified that pregnancy-based classifications *are* sex-based classifications. (She cited Justice Brennan's dissent in *Geduldig v. Aiello.*)

In the full Judiciary Committee markup of H.J. Res. 1, primary legislative history was established in a colloquy between the Ranking Minority Member of the full Committee and the Chairman of the Subcommittee on Civil and Constitutional Rights.

In response to a question as to whether the standard of review for a pregnancy classification under H.J. Res. 1 would be decided under a rational basis test or a strict judicial scrutiny test, the Chairman of the Subcommittee acknowledged the latter. Many legal scholars believe that the *Harris v. McRae* case, which upheld the Hyde amendment, would be rendered overturned if the Hyde amendment were subject to a strict judicial scrutiny test (which is currently used for racial discrimination cases) and if abortion were considered a pregnancy classification. Immediately after this statement, the Chairman of the Subcommittee quoted an analysis by Professor Anne Freedman which stated that the Supreme Court remains committed to a privacy based analysis. The implication being that the ERA would have no effect on abortion rights or the Hyde amendment. Similar assertions were made by witnesses in testimony before the Subcommittee. This privacy analysis is a clever technique to cloud the issue. It is true that the Supreme Court has upheld the right to abortion under the privacy penumbra. *Roe v. Wade*, 410 U.S. 113 (1973). However, what the Chairman of the Subcommittee and witnesses failed to state is that the U.S. Supreme Court in the *McRae* case scrutinized the Hyde amendment and concluded that it did not violate equal protection principles.

In the *McRae* case, the Supreme Court also held that there was a rational basis for upholding the Hyde amendment: "It follows that the Hyde amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate government objective of protecting human life." *Id.* at 325. The Court's holding is as follows:

"We hold that a state that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which Federal reimbursement is unavailable under the Hyde amendement. . . We hold further that the funding restriction of the Hyde amendment violates neither the fifth Amendment nor the establishment clause of the Fifth Amendment."

The Supreme Court, in the *McRae* case, also concluded that the Hyde amendment did not violate equal protection principles because it did not disadvantage a "suspect class" where strict judicial scrutiny would apply.

In *William v. Zabraz*, 448 U.S. 297, which was decided on the same day, the Supreme Court held a State funding restriction similar to the Federal Hyde amendment did not violate the constitutional restrictions of the equal protection clause of the fourteenth Amendment.

It is clear that under the ERA classifications based on unique physical characteristics would be given strict judicial scrutiny and that restrictions in the Hyde amendment and and similar State laws for funding abortions would clearly be reviewed under strict scrutiny.

Therefore, the Supreme Court, in looking at abortion rights, could still hold that abortion is connected with the right to privacy. It could also, under the strict judicial scrutiny test, invalidate the Hyde amendment without reversing itself and without mentioning anything about the right to privacy.

Even if Federal or State funding of abortion or issues relating to abortion were privacy questions, an *explicit amendment* to the Constitution such as that embodied in H.J. Res. I would probably overrule any implied fundamental right to privacy.

Witnesses who testified before the Subcommittee expressed their concern over the ERA. For example, Paige Cunningham, Executive Director of the Americans United for Life, Legal Defense Fund, in testimony before the Civil and Constitutional Rights Subcommittee, stated:

"The language of the ERA does not, on its face, implicate abortion. However, in view of positions taken by abortion advocates under state equal rights provisions, the views of leading ERA proponents, and the decisions of the judiciary in abortion-related matters, this potential connection is obvious. Only new language, a specific disclaimer, or rigidly drafted legislative history assure that this result will not occur.

"Otherwise, the federal courts will have a blank check to interpret the ERA in the abortion context as they choose—a result that as an advocate of the right to life for all human beings I must oppose."

The ERA-abortion connection concern was echoed by Professor Jules Gerard, Professor of Law, Washington University, St. Louis, when he stated that "the argument that ERA would invalidate current laws denying funding for abortions is perfectly straight-forward."

Professor Henry Karlson, also a witness before the Subcommittee, testified about his concern over *Harris v. McRae* being overturned. Using the *Bob Jones* rationale, he also testified about the impact of a hospital sponsored by a religious institution that has tax-exempt status that does not perform abortions. This could be construed as contrary to public policy, i.e., sex discrimination, and found to violate the ERA. He notes the failure to amend the ERA to make it clear it is abortion-neutral should be considered an open-ended invitation to the Federal judiciary to use the ERA to invalidate all State and Federal laws dealing with the subject.

It makes little difference as to whether a standard of review for the ERA would be an absolute one and prohibit all sex discrimination with no exceptions or whether sex discrimination would be treated as race discrimination—a suspect class—where a compelling state interest would be needed. Former Congressman and Ranking Minority Member of the Civil and Constitutional Rights Subcommittee, Charles E. Wiggins, testified that the *Harris v. McRae* decision, upholding the Hyde Amendment, would be endangered as it was a close 5–4 decision. Paige Cunningham, of Americans United for Life, echoed the same concern.

The hearing record showed the split between constitutional experts on the issue. In markup, the Subcommittee Chairman provided inconsistent and incomplete answers on how the ERA would affect abortion. It would be impossible for the Committee report to make any sense out of what was said at the full Committee markup with respect to whether there is an ERA-abortion connection. We do know that the Subcommittee Chairman said the Hyde amendment would be strict judicial scrutiny. The Sensenbrenner amendment will be offered during House consideration of H.J. Res. 1 to make crystal clear that the intent of the ERA is not to expand abortion rights—that the ERA is abortion-neutral—with respect to the Hyde amendment, with respect to religious hospitals or other institutions that do not allow abortions, to name but a few.

As Lane Kirkland, President fo the AFL-CIO, testified before the Subcommittee ". . . while we recognize that a few substantial issues have been raised—such as the effect, if any, of the ERA on the right to an abortion . . . we believe Congress may, and should, provide authoritative guidance to the courts. . . ."

The adoption of an amendment to make the ERA abortion-neutral would help in its ratification by the States. It could take away the opposition of a large constituency who may or may not have any opposition to the Equal Rights Amendment as a substantive issue. As State representative Alan Quist of Minnesota testified: "It [abortion] probably is the key issue [regarding passage of the Equal Rights Amendment in Minnesota]".

The adoption of an amendment is the only way to insure that the ERA will be abortion-neutral. The courts can ignore report language, they can ignore statements on the floor of the House and Senate, but they cannot ignore explicit instructions on the intent of the ERA that appears in the body of the amendment itself.

PRIVATE AND PAROCHIAL SCHOOLS

It does not take a strained imagination to see that the Equal Rights Amendment could have a sweeping impact on many of our private and parochial schools.

The ERA refers to "equality of rights under the law." This means there must be some sort of "state action" involved before the ERA is triggered. The Fourteenth Amendment, which also has a state action requirement has been construed quite broadly so that the distinction between what is private action and what is public (state) action has become quite muddled.

With regards to both private and parochial education, state action under the ERA could be a variety of things, many of which have already been construed as state action for purposes of the Fourteenth Amendment. Public involvement could mean an institution receiving direct financial assistance from the Federal, State or local government for its educational programs or building programs; indirect financial assistance (i.e., grants, loans, or guranteed student loans) made to students for tuition costs; tuition tax credits at the Federal or State level to parents who send their children to private or parochial schools; the granting of tax-exempt status to an institution by a government entity, to name a few. In fact, Dr. Donna Shalala, President of Hunter College, who was selected to testify by ERA proponents at a hearing before the Senate Subcommittee on the Constitution on October 13, 1983, on the effects of the ERA on private education, stated:

"I do not know of any institution in the country in which there is not public involvement."

Thus, it seems the ERA would affect all private educational institutions.

In the area of parochial schools, similar and different concerns arise. For example, the Catholic Church, Orthodox Jewish Synagogue and the Mormon Church all have polices that distinguish in their treatment between men and women. Constitutional scholars over the ERA application to religious and parochial schools. There is even more reason to be concerned if the ERA's application to parochial and religious schools when viewing it in conjunction with the decision of the U.S. Supreme Court in the case of *Bob Jones University* v. *United States*, (No. 81-3, decided May 24, 1983, 51 U.S.L.W. 4593).

In *Bob Jones*, the U.S. Supreme Court held that the Internal Revenue Service was permitted to revoke the tax-exempt status of a university which for religious reasons prohibited interracial dating and marriages. If the Equal Rights Amendment becomes part of our Constitution and sex is elevated to the level of a suspect classification, it is very possible that the Internal Revenue Service, using the same "public policy" rationale articulated in the *Bob Jones* case, would deny tax-exempt status to religious educational institutions that discriminate on the basis of sex (i.e., those which do not train women to become priests, rabbis, ministers etc.) or 501(c) tax-exempt status to private single sex institutions.

Professor Henry Monaghan of Columbia University Law School and a supporter of the ERA, in testimony before the House Judiciary Subcommittee on Civil and Constitutional Rights, testified that using the analogy of sex discrimination with race discrimination articulated in the *Bob Jones* case, the tax-exempt status of a Jewish theological seminary could be revoked by the Internal Revenue Service.

In the markup of H.J. Res. 1 before the House Judiciary Committee, an amendment to exempt private and parochial schools from the Equal Rights Amendment was defeated. During the debate on the amendment, it became apparent that the proponents of the ERA who were opposed to the amendment and who spoke on the issue did not know what effect the ERA would have on these institutions.

For example, no legal authority was given at the hearings or in markup to prevent IRS from removing the tax-exempt status of private single-sex schools or certain religious educational institutions in accordance with public policy. In fact, it appeared that a double standard would be used with men's single-sex schools being outlawed while women's single-sex schools would be allowed to continue to operate under a tax-exempt status if fulfilling a compensatory purpose. While observations were made that the standard would be strict judicial scrutiny, no one opponent of the private and parochial schools amendment could clearly articulate how this standard would be applied. In any event, it is possible that the Equal Rights Amendment as reported out of the House Judiciary Committee could have a radical effect on private and parochial education.

ERA AND THE MILITARY

When H.J. Res. 1 was before the full Judiciary Committee, several amendments were offered: by Mr. Hall, to exempt the draft from the ERA; by Mr. Shaw, to exempt women from serving in combat under the ERA; by Mr. Sawyer to exempt Article I, Section 8, Clauses 12, 13, and 14 from the ERA. These amendments were defeated by votes of 13 to 18, 11 to 20, and 13 to 18, respectively.

Article I, Section 8, Clauses 12, 13, and 14, currently gives Congress the exclusive power to raise and support armies, to provide and maintain a navy and to make rules for government regulation of the land and naval forces. Thus, it is within the discretion of the Congress of the United States to determine the occasion for the expansion of our armed forces and the means best suited to such expansion, should it prove necessary.

Ratification of the ERA would certainly limit Congress' power and flexibility under Article I, Section 8, of the Constitution.

For one thing, it would require that females both register for the draft and be drafted if the occasion should arise. In the hearings held by the Subcommittee on Civil and Constitutional Rights, supporters of the ERA admitted that this result would be required. In fact, they were boastful of this result. We certainly should take the supporters at their word. The ERA prohibits sex discrimination. The draft treats men and women differently, and thus an all-male draft would be held unconstitutional.

Congress, as late as 1980, rejected President Carter's proposal to register for the draft both men and women. The U.S. Supreme Court in the case of *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), upheld the exemption. If there is such an overwhelming need to have women register for the draft or be subject to the draft, then Congress can do it now without having the ERA ratified.

In addition, there are also practical considerations that should be taken into account. For instance, it is unclear whether women with small children would be required to serve. It would seem to violate the absolute language of the ERA to provide an exemption to a married woman with small children while not exempting her husband. This would certainly continue the sex stereotyping that has been criticized by the feminists advocating an ERA with no clarifying amendments.

It seems clear that a strong argument could be made that the ERA would force women to serve in combat. Currently, either by statute or by regulation, the four branches of the military do not allow women to be eligible to serve in jobs that are classified as combat related. This amounts to only about 10% of the jobs in the armed forces. If the ERA is ratified, our armed forces would be subject to lawsuit after lawsuit; a certain job classification could operate to exclude a large number of women. Such a classification (neutral on its face but discriminatory in effect) would be made as to physical strength requirements for combat-related activities. The absolute language of the ERA and various statements made by proponents indicate that any sex policy that would exclude women from combat would be unconstitutional. ERA proponents indicate that job requirements in the military should be based on individual characteristics and not based on sex. This is already the case for 90% of the jobs that are not combat related.

The adoption of an ERA with an exclusion for the military is in line with what the vast majority of the American people want. The fact that the ERA encompassed these issues was one of the principal reasons it failed to be ratified last time around. This fact is buttressed by a 1980 Gallup poll that found only 21% of the population being in favor of women in combat roles.

It has been argued that our next war will not feature hand-to-hand combat. Thus, physical strength will be less of a concern in our draft. Our recent experience in Grenada and Lebanon should dispel the fallacy. On the issue of combat, Brigadier General Elisabeth Hoisington, former Director of the Women's Army Corps (WACs), in testimony before the House Judiciary Subcommittee on Civil and Constitutional Rights, had this to say about women serving in combat:

". . . the overwhelming majority of women cannot match men in aggressiveness, physical stamina, endurance, and muscular strength in long-term situations."

Finally, when Professor Thomas Emerson of Yale Law School and Anne Freedman of Rutgers University Law School testified before the Subcommittee, they both referred to the principle that was articulated in a Yale Law Journal article that they coauthored in 1971. The following is an excerpt from this article:

"We must radically restructure our view of women in the military under the ERA. There's no reason why a woman cannot serve in combat if she can pass the physical, and if she can carry a 50-pound pack."

RATIFICATION PERIOD

House Joint Resolution 1, like its predecessor, which was submitted to the States for ratification, has a seven-year time period for ratification. However, this seven-year time period is not in the body of the amendment.

In Committee, a very constructive amendment was offered by the gentleman from Ohio, Mr. Kindness, which would place the ratification time frame within the body of the amendment itself. This distinction was of great significance in 1978 when the time period for ratification was extended. The Kindness amendment is in line with the form of other Amendments (the 18th, 20th, 21st and 22nd Amendments) which also contained a seven-year time frame for ratification within the body of the amendment itself instead of in the resolving clause.

CONCLUSION

In any event, unless the ERA is clarified to address the concerns that caused it not to be ratified after an unprecedented 10 year period, the same result will occur with House Joint Resolution 1.●

IV. LEGAL ANALYSES

THE EQUAL RIGHTS AMENDMENT IS NOT THE WAY

*by Paul A. Freund**

My interest in the Equal Rights Amendment goes back twenty-five years, when I was encouraged to draft a statement in opposition on behalf of twenty lawyers and law professors, including Dean Pound of Harvard.[1] Last year I learned that this statement was being circulated anew by the AFL-CIO, and it became necessary to review my position on the subject.

The issue has always been over choice of means, not over ends. The objective is to nullify those vestigial laws that work an injustice to women, that are exploitative or impose oppressive discriminations on account of sex. Although such laws have been progressively superseded or held to be violative of equal protection,[2] some of these laws still disfigure our legal codes. Beyond this, the Women's Rights Movement seeks to achieve equal opportunity and equal treatment for women in business, professional, domestic, and political relationships, but unless equality is denied by a public agency or because of a law the Equal Rights Amendment by its terms has no application. If we want to see more women in law firms, in the medical profession, in the Cabinet—and I, for one, do—we must turn elsewhere than to the proposed amendment. The point is not the smug argument that we must change hearts and minds and attitudes (though that too is involved) rather than look to law; the point is that within the realm of law we have to compare the effects and effectiveness of a constitutional amendment on the one hand and the mandate of congressional legislation and judicial decisions on the other.

The proposed amendment attempts to impose a single standard of sameness on the position of the sexes in all the multifarious roles regulated by law—marital support, parental obligations, social security, industrial employment, activities in public schools, and military service—to mention the most prominent. It is necessary to try to analyze all these various applications of the single-standard formula in order to discern whether anomalies, uncertainties, and injustices would result. Unfortunately we have no definitive guide in such an exploration, for neither in the House nor in the Senate was there a committee report on the amendment, which might have focused attention on concrete issues rather than on a generalized slogan—"equal rights under law"—which is intended to supplant "equal protection of the laws." The alternative legal course is to achieve changes in the relative position of women through paramount federal standards or to overcome invidious classifications on the ground that they are presently unconstitutional. The choice resembles that in medicine between a single broad-spectrum drug with uncertain and unwanted side-effects and a selection of specific pills for specific ills.

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[1] The statement appears in *Hearing on S.J. Res. 61 Before a Subcomm. of the Senate Comm. on the Judiciary*, 79th Cong., 1st Sess. 78-80 (1945). A list of signatories appears in 116 CONG. REC. S 13906 (daily ed. Aug. 21, 1970) (remarks of Sen. Ervin).

[2] *E.g.*, United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. (1968); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968). Both cases invalidated statutes providing for more severe penalties for women than for men convicted of certain offenses.

In comparing the problem of choice twenty-five years ago and today, I concluded that so far from the case for amendment being strengthened, the choice of the alternative course was even more strongly indicated. The reason is that during the intervening years both the scope of congressional power and the promise of judicial redress have been made clearer, while the dangers implicit in the amendment remain as before. Congressional power under the commerce clause, as the civil-rights legislation shows, is adequate to deal with discrimination (whether private or governmental) based on sex, as on race. This authority has been utilized to some extent in relation to sex discrimination in employment practices[3] but not to such discrimination in places of public accommodation. Discrimination in matters of family law could be reached under Congress' power to enforce the equal-protection guarantee, as set forth in *Katzenbach v. Morgan.*[4]

Recently, to be sure, a majority of the Court refused to extend that decision to the case of the claims of 18-year-olds to share in the suffrage; but the refusal hinged on a reluctance to regard the minimum voting age for elections as a subject coming within the guarantee of equal protection.[5] Even without benefit of congressional action, the guarantee has been markedly enlarged in recent years; it has served to invalidate legislative classifications based on such factors as poverty, illegitimacy, duration of residence.[6] Surely nineteenth-century decisions holding, for example, that women could be denied admission to the bar[7] are museum pieces and should not figure in any present discussion of equal rights.

The paucity of contemporary Supreme Court decisions can be ascribed partly to the failure of women's groups to mount a series of selected test cases challenging forms of discrimination, and in part to the fact that some discriminatory laws have been held invalid by lower courts, without further appeal.[8] One Supreme Court decision, however, is a target of indignation by proponents of the amendment: *Hoyt v. Florida.*[9] The Court held by a divided vote that a state law might relieve women of jury duty unless they signified their willingness to serve, while requiring men to present specific reasons for excusal. Experience had shown that a much higher percentage of women than of men had in fact secured excusal on an individual basis, because of household duties, and the law was tailored to reflect this experience in a differentiated procedure based on a differentiated presumption of fact. As the Justices were divided, so, it seems to me, can reasonable persons of good will disagree among themselves on the decision. But to regard the decision as an indivious discrimination or a degrading affront to women that calls for redress by a constitutional amendment is surely far-fetched and obsessively sensitive. The classification more nearly resembled a factual generalization based on age or height than on race or color.

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[3] Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e - 2000e-15 (1964).

[4] 384 U.S. 641 (1966).

[5] United States v. Arizona, 91 S. Ct. 260 (1970).

[6] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (residency); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poverty); Douglas v. California, 372 U.S. 353 (1963) (poverty).

[7] *In re* Lockwood, 154 U.S. 116 (1894); Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872).

So far I have set out reasons why the amendment is not necessary or appropriate. Before leaving this point, let me add that even if the amendment were adopted, legislation on the state or federal level would be necessary to carry it out in its myriad applications. Four words will not in themselves remake the laws of age of consent, marital property rights, marital and parental legal duties, and protective factory legislation. The energies that have been spent for forty years in a effort to secure the submission of the amendment by Congress to the states would have to be followed, even if ultimately successful, by efforts to revise the laws in a satisfactory way. It is hard to believe that this preliminary struggle to obtain the support of two-thirds of Congress and three-fourths of the states is other than a diversion of energy from the essential task of revising the laws themselves.

In some fields a national mandate to the states is a useful, even necessary, prelude because there is a bloc of recalcitrant states or because individual states fear a loss of competitive advantage in raising their standards. The latter was the case, for example, with unemployment compensation, which lagged in the states until federal tax credit legislation took away the supposed advantage of holding out.[10] So far as women's rights are concerned, a similar situation conceivably might exist with respect to a disadvantaged position in industry; but there is a twofold answer to this supposition. So far as merely private discrimination is concerned, the amendment has no application, and all discrimination, private or governmental, is subject to the paramount power of Congress under the commerce clause. In non-commercial fields, such as marital property or parental duties, there is no need to go to the states for a preliminary mandate to change their laws. If three-fourths of the states are prepared to ratify the amendment, it is hard to see why they must first thus admonish themselves to do justice before they are prepared in fact to do justice. Although forty years of frustration ought to have carried a lesson, no doubt it seems easier to place a resounding and all-encompassing phrase in the Constitution than to identify specific wrongs and draft model laws to correct them. Yet it is the latter that sooner or later will have to be done, whatever the fate of the amendment—and I suggest that it be sooner.

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[8] *See* note 2 *supra. See also* Kirstein v. Rector and Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970) (requiring admission of women to all-male campus of the University of Virginia, where facilities open to women were not equal); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (holding invalid the exclusion of women from jury service).

[9] 368 U.S. 57 (1961).

[10] *See* Steward Machine Co. v. Davis, 301 U.S. 548, 587-88 (1937).

Still, it may be suggested, the amendment would serve importantly as a symbol—a symbol that the nation has made a commitment to justice for women under law. One gets the impression that much of the drive for the amendment owes its force to this psychological wellspring. The value of a symbol, however, lies precisely in the fact that it is not to be taken literally, that it is not meant to be analysed closely for its exact implications. A concurrent resolution of Congress, expressing the general sentiment of that body, would be an appropriate vehicle for promulgating a symbol. When, however, we are presented with a proposed amendment to our fundamental law, binding on federal and state governments, on judges, legislatures, and executives, we are entitled to inquire more circumspectly into the operational meaning and effects of the symbol. Lawyers, in particular, have an obligation to ask these questions and to weigh the answers that are given. For if the amendment is not only a needless misdirection of effort in the quest for justice, but one which would produce anomalies, confusion, and injustices, no symbolic value could justify its adoption. We turn, then, to these issues of meaning and effect.

A mandate that equal rights under law shall not be denied or abridged by the United States or any state on account of sex can have either of two conceivable meanings. It can mean that any classification based on sex must be justified by some good (or very good, or compelling) reason, or it can mean that no such classification can pass muster. To this question there is no authoritative answer to be found in the congressional history of the proposed amendment, but the literature of its main sponsors insists on an absolute meaning. This interpretation has been reinforced by the recent experience with the amendment in the Senate. After the original version was amended to death, Senator Bayh and other proponents offered a revised version, using the language "equal protection of the laws shall not be denied or abridged . . . on account of sex." This formulation, adopting the language of the fourteenth amendment but explicitly stressing its application to classifications based on sex, would have been accepted by a number of opponents of the original version. (I would not feel impelled to oppose the revised version, though doubting its necessity.) But it was the most active groups behind the amendment that refused to accept the substitute. They protested that courts or legislatures might find compelling reasons for certain classifications, and this result was unacceptable.[11] I should have thought that if there are compelling reasons and if the amendment would allow them to prevail, that outcome would be cause for satisfaction, not intransigent complaint.

A doctrinaire equality, then, is apparently the theme of the amendment. And so women must be admitted to West Point on a parity with men; women must be conscripted for military service equally with men (though classification on an individual basis for assignment to duties would be valid, it is asserted);[12] girls must be eligible for the same athletic teams as boys in the public schools and state universities; Boston Boys' Latin School and Girls' Latin School must merge (not simply be brought into parity); and life insurance commissioners may not continue to approve lower life insurance premiums for women (based on greater life expectancy)[13] —all by command of the Federal Constitution.

Perhaps the country ought to consider conscripting women equally with men. My point is not that we must maintain the status quo; it is that a change so far-reaching and inflexible ought surely not be brought about as the half-hidden implication of a constitutional motto. Changes of far less import in the draft law have been the subject of full-scale hearings, committee reports, and debate in and out of Congress. Can we assume that every member of Congress who is prepared to vote for the amendment is equally prepared to explain and justify its effect on military service and to support that result before his constituents? A similar question has to be raised about each of the other foregoing illustrative consequences of the amendment. The irreverent thought obtrudes itself that either not every member of Congress has been adequately briefed on the amendment's implications or not every member takes seriously the possibility of its ratification. This irreverence is reinforced when it is remembered that such subjects as selective service or admission to West Point are wholly in the control of Congress, and there is no reason to wait for the mandate of three-fourths of the states if Congress really regards sex differentiation in those institutions as unacceptable and is bent on ending it. Indeed, the change could be brought about by simple majority vote, not the two-thirds required to submit a constitutional amendment.

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[11] N.Y. Times, Nov. 12, 1970, at 19, col. 3. *But cf.* "Separation of the sexes by law would be forbidden under the amendment except in situations where the separation is shown to be necessary because of an overriding and compelling public interest and does not deny individual rights and liberties." Citizens' Advisory Council on the Status of Women, *A Memorandum on the Proposed Equal Rights Amendment to the Constitution* in 116 CONG. REC. E2588, E2591 (daily ed. March 26, 1970). The dimensions of this escape hatch are left unexplored. The only example given is the maintenance of separate restrooms, which other proponents have explained as preserving a right of privacy. *See* p. 240 *infra.*

[12] Citizens' Advisory Council on the Status of Women, *supra* note 11, at E2590, E2591.

[13] *Cf.* Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968) (higher Social Security retirement benefits for women sustained). Presumably the amendment would require a different result.

Special scrutiny should be given to the field of domestic relations, with its complex relationships of marital duties and parental responsibilities. Every state makes a husband liable for the support of his wife, without regard to the ability of the wife to support herself. The obligation of the wife to support her husband is obviously not identical to this; if it were, each would be duty bound to support the other. Instead, the wife's duty varies from state to state. In some jurisdictions there is no obligation on the wife, even if the husband is unable to support himself. In others, the wife does have a duty of support in such a case.

In 1968 a recommendation on the subject was made by a Task Force on Family Law and Policy of the Citizens' Advisory Council on the Status of Women, a group that supports the amendment. The recommendation was a progressive and equitable one: "A wife should be responsible for the support of her husband if he is unable to support himself and she is able to furnish such support."[14] So far, so good. But what would be the effect on the rule fixing the husband's duty? Some members of the Task Force, but only some, took a position of reciprocity consistent with the principle of the amendment: "Some of the task force members believed that a husband should only be liable for the support of a wife who is unable to support herself due to physical handicap, acute stage of family responsibility or unemployability on other grounds."[15] This solution, dictated by the Equal Rights Amendment, would be contrary to the law of every state. Moreover, the support owed solely to "a wife who is unable to support herself" might be further eroded by the establishment of child-care centers. Where such centers are created, presumably a wife with small children would no longer be "unable" to support herself through employment, and so under the constitutional rule of reciprocity would lose the right of support from her husband. Thus child-care centers could, by a reflexive effect on the mother's ability to work outside the home, constitute a threat rather than an opportunity. Of course the spouses would be free to enter into an agreement regarding support, but the law is necessarily concerned with rules and presumptions in the absence of agreement.

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[14] Citizens' Advisory Council on the Status of Women, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY 9 (1968).

[15] *Id.*

Is the favorable treatment now everywhere accorded to wives in respect of support a manifestation of male oppression or chauvinism or domination? Can it be expected that all the states will make an about-face on the law of support within a year of the adoption of the amendment; and if they do not, what will be the reaction of wives to the Equal Rights Amendment when husbands procure judicial decisions in its name relieving them of the duty of support because an equal duty is not imposed on their wives?

It is sometimes said that a rigid requirement of equality is no less proper for the sexes than for the races, and no less workable. But the moral dimensions of the concept of equality are clearly not the same in the two cases. To hold separate Olympic competitions for whites and blacks would be deeply repugnant to our sensibilities. Do we– should we–feel the same repugnance, that same sense of degradation, at the separate competitions for men and women? A school system offering a triple option based on race–all-white, all-black, and mixed schools–would elevate freedom of choice over equal protection in an impermissible way. Are we prepared to pass that judgment as readily on a school system that offers a choice of boys', girls', and coeducational schools? A family that prefers to send its daughter to a girls' school or college and its son to a boys' school or college is not thereby committing an invidious discrimination; their judgment of relative educational advantages may be wise or unwise, but it is not so far beyond the bounds of legitimate discretion, experimentation, and good will as to call for a uniform constitutional mandate closing off that area of choice. One of the prime targets of the equal-rights movement has been the color-segregated public rest room. Whether segregation by sex would meet the same condemnation is at least a fair question to test the legal assimilation of racism and "sexism."

The answer proffered is that a counter-principle, a constitutional right of privacy, would be invoked at this point.[16] But this is only to restate the problem, which is whether there are not considerations other than identical treatment that ought to be taken into account in the various contexts of relations between the sexes. If privacy is one such consideration, though unexpressed in the amendment, when will it prevail and when will it not? Is privacy in fact the only unexpressed countervailing interest? Freedom of association is a constitutional right enjoying recognition even longer and firmer than privacy. It has been invoked without avail, as has the interest in privacy, to blunt the force of equal protection in the field of racial separation. Is it to have greater recognition (as in the area of public education) where relations between the sexes are concerned? Moreover, interests more social, less individual, than privacy or association are actually involved. If a public school conducts separate physical education classes for boys and girls, or a prison maintains separate cells for men and women, would the validity of the separation depend on a claim of privacy? If the pupils or prisoners waived any interest in privacy and wished to amalgamate the classes or the cells, would the school or the prison be required to conform? Or could the law respect a wider community sentiment that separateness was fitter and not invidious?

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[16] Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 225, 231 (1971).

Constitutional amendments, like other laws, cannot always anticipate all the questions that may arise under them. Remote and esoteric problems may have to be faced in due course. But when basic, commonplace, recurring questions are raised and left unanswered by text or legislative history, one can only infer a want of candor or of comprehension.

I would not wish to leave the subject on a purely negative note. My concern, as I have said, is with the method proposed, which is too simplistic for the living issues at stake. It remains, then, to suggest alternative approaches. A great deal can be done through the regular legislative process in Congress. Concrete guidelines are set forth in an April 1970 Report of the President's Task Force on Women's Rights and Responsibilities. After recommending support of the proposed amendment, the Report urges that

– Title VII of the Civil Rights Act of 1964 be amended to empower the EEOC to enforce the law, and to extend coverage to state and local governments and to teachers;

– Titles IV and IX of the Civil Rights Act be amended to authorize the Attorney General to assist in cases involving discrimination against girls and women in access to public education, and to require the Office of Education to make a survey on that subject;

– Title II of the Civil Rights Act be amended to prohibit discrimination because of sex in public accommodations;

– the jurisdiction of the Civil Rights Commission be extended to include denial of civil rights because of sex;

– the Fair Labor Standards Act be amended to extend coverage of its equal pay provisions to executive, administrative, and professional employees;

– liberalized provisions be made for child-care facilities.[17]

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[17] President's Task Force on Women's Rights and Responsibilities, A MATTER OF SIMPLE JUSTICE iv-v (1970).

It is an extensive, important, and thoughtful set of proposals. If a two-thirds majority can be found for the abstraction of the Equal Rights Amendment, it would be puzzling to know why a simple majority could not even more readily be found to approve this concrete program.

In addition, Congress would give a vigorous and valuable lead by enacting model laws for the District of Columbia in the fields of labor legislation and domestic relations.

Moreover, a few significant decisions of the Supreme Court in well-chosen cases under the fourteenth amendment would have a highly salutary effect. And decisions under Title VII of the Civil Rights Act will clarify the role of state laws regulating employment in light of the statutory concept of bona fide occupational qualifications.[18]

Finally, Congress can exercise its enforcement power under the fourteenth amendment to identify and displace state laws that in its judgment work an unreasonable discrimination based on sex. In this connection let me point out a serious deficiency in the proposed amendment. Its enforcement clause gives legislative authority to Congress and the states "within their respective jurisdictions." This is a more restrictive authorization to Congress than is to be found in any other amendment, including the fourteenth. If the new amendment is deemed to supersede the fourteenth concerning equal rights with respect to sex, Congress will be left with less power than it now possesses to make the guarantee effective. This is the final anomaly.

The time has come for action, for meaningful action, for action based on a clear idea of just what it is that we are trying to correct and to bring about by law. For more than forty years there has been pursuit of the *ignis fatuus* of a constitutional amendment. This course has been opposed by individuals and groups whose commitment to civil rights and women's rights is not in question: groups that include the National Council of Negro Women, the National Council of Catholic Women, the National Council of Jewish Women, the American Association of University Women, and the Commission on the Status of Women, appointed by President Kennedy and chaired by Eleanor Roosevelt.[19] The real issue is not the legal status of women. The issue is the integrity and responsibility of the law-making process itself.

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[18] *See* Phillips v. Martin Marietta Corp., 39 U.S.L.W. 4160, 4160-61 (U.S. Jan. 25, 1971) (Marshall, J. concurring).

[19] *See also* the valuable recent report recommending against adoption of the amendment, Committee on Federal Legislation, *Amending the Constitution to Prohibit State Discrimination Based on Sex*, 26 RECORD OF N.Y.C.B.A. 77 (1971).

THE EQUAL RIGHTS AMENDMENT: SOME PROBLEMS OF CONSTRUCTION

*by Philip B. Kurland**

Before I begin to discuss the problems of construction that I see in the Equal Rights Amendment proposed to the Ninety-first Congress, I think it appropriate to reveal some of my conscious prejudices, so that the reader may discount my bias in evaluating my arguments. First is my notion of the proper function of constitutional amendments. I think that they are clearly the best—and should be the exclusive—means of bringing about changes in governmental structure. I think that they also offer an appropriate means for reversal of constitutional decisions of the Supreme Court. I think that they may be the necessary means for protecting minorities from being imposed on by the majority and for protecting the unenfranchised against imposition by the enfranchised. Women, however, are neither a minority nor unenfranchised. This suggests to me that the most appropriate means for bringing about the desired changes would be by appropriate legislation rather than constitutional amendment.

Second, I am convinced that women in this country suffer from unreasoned discrimination against them in many phases of their lives, not least in the sphere of employment. But I am also of the view that this unjustified discrimination does not derive primarily from governmental action, except insofar as the government, as employer, behaves like other employers.[1]

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Much of the data on which I rely was compiled by Peter H. Fritts, Esq., when he was a student in my seminar on the legislative process in 1966. He is, of course, not responsible for the use to which I put the contents of his seminar paper here. His paper is available in The University of Chicago Law School's Library. I am grateful to him.

[1] *See* note 26 *infra*

For those who believe that personal factors are also relevant in determining bias, I would add some biographical data. I am a male. I am married. I have never been divorced. My wife is a professional who is temporarily, probably, by personal predilection, surely, devoting full time to housekeeping and child raising. We have three lovely children, all girls. My job is certainly one that could be filled by a female no less adequately than by a male. I belong to no organization that discriminates on the basis of race, creed, sex, or national origin. I have no religious beliefs that direct my attitude to discrimination on the basis of sex. But I do have a Jewish mother. I find humor in Thurber's *War between the Sexes*. I do not subscribe to, but I do read and look at, from time to time, *Playboy* magazine.

I. SOME LEGISLATIVE HISTORY

Forty-seven years after it was first proposed in Congress,[2] originally sponsored by those who had successfully waged the battle for the women's suffrage amendment,[3] a joint resolution to initiate an "equal rights amendment"[4] was sprung from the tight grasp of Representative Celler, chairman of the House of Representatives Committee on the Judiciary, rushed through the House after a debate of less than one hour,[5] and failed of endorsement in the Senate by a whisker. The 1923 version was put simply and ambiguously: "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation." Obviously, this language was rife with problems of appropriate construction. The 1970 language, in essentially the same form that had been used for the last fifteen years or so, afforded different, but no less challenging ambiguities. It read: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."

The proposal for an "equal rights" amendment obviously had not lain dormant between 1923 and 1970. After the initial impetus provided by the suffragettes, it had emerged again in the period following the Second World War, during which much of what had theretofore been considered "men's work" had been ably performed by women. Indeed, in the years 1942, 1943, 1946, 1948, 1949, 1951, 1953, 1956, and 1962, the Senate Committee on the Judiciary had reported favorably on essentially the same proposal as that under consideration in 1970.[6] And, in 1950 and 1953, the Senate had approved those resolutions with votes of 63 to 19 and 73 to 11 respectively.[7] There was, therefore, some irony in the fact that the proposal that had in the past succeeded in the Senate but languished in the House of Representatives should, in 1970, have met its doom in the upper house after passage in "the other body."

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[2] H.R.J. Res. 75, 68th Cong., 1st Sess. (1923).

[3] *Cf., e.g.*, the statement of Miss Mabel Vernon, Executive Secretary of the National Woman's Party, before the Committee on the Judiciary of the House of Representatives: "... as we were working for the national suffrage amendment ... it was borne very emphatically in upon us that we were not thereby going to gain full equality for the women of this country, but that we were merely taking a step, but a very important step, it seemed to us, toward the gaining of this equality." *Hearings on H.R.J. Res. 75 Before the House Comm. on the Judiciary*, 68th Cong., 2d Sess. 2 (1925).

[4] H.R.J. Res. 264, 91st Cong., 2d Sess. (1970).

[5] The vote was 350 to 15, 116 CONG. REC. H7984 (daily ed. Aug. 10, 1970).

[6] S.J. Res. 8, S. REP. No. 1321, 77th Cong., 2d Sess. (1942) [Apparently the Report was never actually written. *See* 88 CONG. REC. 4033 (1942) (remarks of Senator Hughes)]; S.J. Res. 25, S. REP. No. 267, 78th Cong., 1st Sess. (1943); S.J. Res. 61, S. REP. No. 1013, 79th Cong., 2d Sess. (1946) [This resolution received a majority but not a two-thirds vote in the Senate, 52 CONG. REC. 9405 (1946)]; S.J.

There is an explanation for this. The Senate had not changed its position in the interim. The two successful Senate forays, in 1950 and 1953, had been accomplished only after the proposal had been amended by Senator Hayden's language, which appended the following: "The provisions of this article shall not be construed to impair any rights, benefits or exemptions conferred by law upon persons of the female sex."[8] Had the proponents of the 1970 proposal taken cognizance of this history and accepted the conditions of the Hayden qualifications, I venture that the proposal would have again readily secured Senate acquiescence. The refusal by some protagonists to accept the qualification was probably not, however, inadvertent; it was calculated.[9] It represented a deliberate choice between two different objectives, either but not both of which the proposed amendment might fully serve.

II. CONSTRUCTION AND RECONSTRUCTION

> Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effectuate a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design.[10]

Res. 76, S. REP. No. 1208, 80th Cong., 2d Sess. (1948); S.J. Res. 25, S. REP. No. 137, 81st Cong., 1st Sess. (1949); S.J. Res. 3, S. REP. No. 356, 82nd Cong., 1st Sess. (1951); S.J. Res. 49, S. REP. No. 221, 83rd Cong., 1st Sess. (1953); S.J. Res. 39, S. REP. No. 1991, 84th Cong., 2d Sess. (1956); S.J. Res. 142, S. REP. No. 2192, 87th Cong., 2d Sess. (1962).

[7] 96 CONG. REC. 872 (1950); 99 CONG. REC. 8974 (1953).

[8] 96 CONG. REC. 870 (1950); 99 CONG. REC. 8973-74 (1953).

[9] *See, e.g.*, 116 CONG. REC. E5452, E5454 (daily ed. June 10, 1970) (Memorandum in support of the amendment by Marguerite Rawalt); 116 CONG. REC. E2588, E2589 (daily ed. March 26, 1970) (Memorandum by the Citizens' Advisory Council on the Status of Women). Both memoranda were inserted into the *Congressional Record* by the amendment's sponsor, Representative Martha W. Griffiths of Michigan.

[10] Frankfurter, *The Reading of Statutes*, in OF LAW AND MEN 60 (Elman ed. 1956).

If it is the duty of the judiciary to effectuate the aim of legislation, it is no less the duty of the legislature, to the best of its capacity, to make clear what its aims are. It ought to say what mischief it wishes to obviate, what inadequacy it wants to supply, what change of policy it desires to effectuate, or what plan of government it seeks to formulate. If it is an act of usurpation for the judiciary to read legislation to effect its own aims and purposes, it is an act of abdication for the legislature to fail to state its purposes and aims in framing the legislative act that it promulgates.

The prime difficulty with the proposed "equal rights" amendment was that the national legislature came close to approval of constitutional legislation without defining–without knowing?–its aims and purposes. This is not a lawyer's cavil. It was a defect so patent that newspaper editorial writers could see it. Thus, the *New York Times* wrote:[11]

> Equal rights for women is a proposition so unarguable in principle and so long overdue in practice that it is a pity to have it approached by the House of Representatives as an exercise in political opportunism. For 47 years that body regularly rejected out of hand all proposals for a women's rights amendment to the Constitution. Now it approves, without committee hearings and after only an hour's debate, a constitutional change of almost mischievous ambiguity.

The *Times* itself was guilty of "confounding the confusion," for it fell into the trap of thinking that "equal rights" and "women's rights" are necessarily descriptive of the same legislative objectives. As discussed below, it is of the essence of the problem that frequently they are not. Thus, there is merit in the *Times'* desire for elimination of "almost mischievous ambiguity," just as there is merit in the editorial proposal of the *Wall Street Journal*: "Well, we're all for the ladies, but even so, before we write some new words into the Constitution it'd be nice to know what they really do mean."[12]

A. A Basic Conflict of Purpose

The primary problem of construction offered by the proposed "equal rights" amendment derives from the fact that the movement for "women's rights" is Janus-faced. The proposed amendment presented one aspect, while much of its support was voiced in terms of its other visage. The first would command the treatment of men and women as if there were no differences between them, even at the price of removing protections and benefits that have otherwise been afforded to females. It was a demand for legal "unisex" by constitutional mandate. And much of the benefit of such a proposal, to the extent it was possible to effectuate it, would inure to males rather than females, since equality may be attained by applying to all the rules that had theretofore been applied only to females, such as a lower age of emancipation, no legal obligation of family support, and exemption from military service.

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[11] N.Y. Times, Aug. 12, 1970, at 40, col. 1.

[12] Wall Street Journal, Aug. 13, 1970, at 6. col. 1.

The second attitude towards "women's rights" would seek only the elimination of discrimination against women, a ban on treating females as a disabled class. Legislation purporting to afford—and in fact affording—privileges to women that were not also available to men would not run afoul of such constitutional provision. But disabilities legally imposed on women because of their sex, such as denial of equal education or employment opportunities, would be invalidated because grounded in a suspect or invidious classification.

The difference between the two is essentially the difference between the amendment without the qualifying Hayden language and with it. And herein lies the conflict among those who would support some constitutional change to abate the legal incapacities of women, certainly a sufficient majority of both the House and the Senate to promulgate an amendment, if they could but agree on its purpose and function.

There are some basic difficulties with the "unisex" approach, not the least of which is that there are physiological and biological differences between men and women that are not subject to eradication even by constitutional amendment. Practically, of course, this may present no difficulties because nature cannot be subjected to human laws, while humans must bow to the laws of nature. The essential claim for such a declaration of "equality of the sexes" is its symbolic value. The temper of our times demands instant and simplistic answers to complex problems, and it is this temper that assumes that the cure for such problems lies in the incantation of the word "equality" by our highest governmental means, the Constitution, or by the voice of the Constitution, the Supreme Court of the United States. Without denying the importance of symbols, it is necessary to recognize that when they are only the creatures of the Constitution their effect, thus far at least, has been less than pervasive.

A second difficulty with a constitutional mandate of instant equality of the sexes is that proferred by history. Times have changed in such a way that it may well be possible for the generation of women now coming to maturity to surrender all special legal protection and privileges. A great majority of them have had all the opportunities for education and training afforded their male peers, with an expectation of full opportunity to put that education and training to the same use. They may well be able to succeed in a competitive society in which all differences in legal rights between men and women are eradicated. There remains, however, a very large part of the female population on whom the imposition of such a constitutional standard could be disastrous. There is no doubt that society permitted these women to come to maturity not as competitors with males but rather as the bearers and raisers of their children and the keepers of their homes. A multitude of women still find fulfillment in this role. This may be unfortunate in the eyes of some; but it remains a fact. It can boast no label of equality now to treat the older generations as if they were their own children or grandchildren. Nor can women be regarded as unified in their desire for this change. Certainly the desire to open opportunities to some of them can be achieved without the price of removing the protection of others.

On the other hand, there are also difficulties in an amendment that does not ban all legislative distinctions in treatment of men and women, which would leave unchallenged laws that purported to confer, in Senator Hayden's language, "rights, benefits or exemptions . . . upon persons of the female sex." Deciding when a statute confers a benefit rather than imposing a disability is often difficult. The most cited example are those laws which provide for minimum wages, maximum hours, limitations on night work, and requirements of sanitary conditions for women workers. Certainly since Louis D. Brandeis fought for the validity of such legislation,[13] it has been assumed by "right-thinking people" that the legislation was for the benefit of women. Classical economists, on the other hand, believe that such laws put women at a competitive disadvantage in the employment market. An early Department of Labor study, however, purported to show that there was no difference in women's employment between those states that had laws providing minimum wages, or banning night work, and those that did not, and only a very small difference between the states that banned women's overtime work and those that did not.[14] This sort of question, whether the legislation affords privilege or imposes disability, however, may be one appropriate for judicial resolution on a case by case basis, with the results dependent on the facts adduced and the values assigned to them. Unfortunately, the proposed amendment and its legislative history offer little guidance to a court attempting to resolve these difficult issues.

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[13] *See* A.T. Mason, BRANDEIS 245-53 (1946).

[14] *See Hearing on S.J. Res. 61 Before a Subcomm. of the Senate Comm. on the Judiciary*, 79th Cong., 1st Sess. 84 (1945).

B. The Problem of Equality

If an amendment were passed that in effect prohibited all legislative classification in terms of sex, the results might not be desirable but the problems of construction would be minimal. The judicial answers could be mechanical and, therefore, easy. The difficulty is that not even the sponsors of such a "unisex" amendment have made the claim for rigid classification. Apparently embarrassed by the prospect of the abolition of such existent requirements as separate toilet facilities for men and women or the availability of "maternity leaves," proponents of the "equal rights" amendment asserted that certain distinctions could continue to be maintained, so long as the principle of equality is assured.[15] The concept of equality is not, however, one that is easily defined or confined.[16]

The phrase "equal rights" might be repeated an infinite number of times without providing additional guidance to the speaker or listener. Mr. Justice Cardozo noted some time ago that "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."[17] And it was almost a century ago that Sir James Fitzjames Stephen asserted that "equality is a word so wide and vague as to be by itself almost unmeaning."[18] Nothing that has happened in the intervening years has made it more specific.

There are suggestions in some of Mr. Justice Frankfurter's opinions to mark the perimeter of a constitutional notion of equality that have an appeal, if only to a small audience. In *Whitney v. Tax Commission*,[19] he pointed out that: "The Equal Protection Clause was not designed to compel uniformity in the face of difference." And, in the same Term of Court, he announced in *Tigner v. Texas*,[20] "The constitution does not require things which are different in fact or opinion to be treated by the law as though they were the same." Applying this notion in the context of the "equal rights" amendment, one might work out some generalizations. Governmental distinction between males and females would have to be justified in fact before it could pass muster under the proposed amendment. If the distinction were based on reason, the legislation should be presumptively valid. The mere fact that there are two sexes should not be reason in itself for distinguishing between them in legislation. On the other hand, the mere fact that a distinction was drawn between them ought not suffice to invalidate the law. I should think, therefore, that appropriate data of sociological conditions, especially those deriving from a history of different treatment of the sexes, might warrant the continuance of certain benefits and protections. This should certainly be true of laws relating to domestic relations, where marriage contracts were made under laws creating certain expectations of the obligations of one spouse to the other, including the male's duty to support both his wife and his children.

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[15] *See* 116 CONG. REC. E2588, E2891 (daily ed. March 26, 1970)(memorandum of the Citizens' Advisory Council on the Status of Women).

[16] *See, e.g.*, P.B. Kurland, POLITICS, THE CONSTITUTION, AND THE WARREN COURT ch. 4 (1970).

[17] Carter v. Carter Coal Co., 298 U.S. 238, 327 (1936).

[18] J.F. Stephen, LIBERTY, EQUALITY, AND FRATERNITY 201 (1873).

[19] 309 U.S. 530, 542 (1940).

[20] 310 U.S. 141, 147 (1940). The Justice was also of the view that "there is no greater inequality than the equal treatment of unequals." Dennis v. United States, 339 U.S. 162, 184 (1950).

C. The Equal Protection Clause

Such a construction necessarily raises the question whether the equal protection clause of the fourteenth amendment does not already afford all that the proposed "equal rights" amendment would offer. The difficulty is that the only informed answer must be that it probably does, but we have no definitive construction by the Supreme Court to give us adequate assurance. Certainly some cases in the past raise doubts that the notion of nondiscrimination on the ground of sex has yet been established. *Breedlove v. Suttles,*[21] *Goesaert v. Cleary,*[22] and *Hoyt v. Florida,*[23] to the extent that they remain viable precedents, do not make it clear that classification by sex is regarded, under the fourteenth amendment, as a "suspect classification" like race or religion.

On the other hand, there can be little doubt that the fourteenth amendment and the commerce clause give the national legislature more than adequate authority to ban discrimination on the basis of sex. And the Civil Rights Act of 1964 affords ample evidence that the power will be utilized where the legislature finds that such invidious discrimination needs extirpation.[24]

If, as is likely, the laws of biology and judicial construction blunt the extreme effects of the "unisex" concept, and the amendment, if adopted, is interpreted in a fashion similar to the fourteenth, the "equal rights" amendment will become more important for its enabling clause than its direct substantive effect. As proposed, it adds little to what is already provided by the fourteenth amendment together with the commerce clause. Nor does the proposal resolve the ambiguities that inhere in a direct restraint on governmental action: To what extent is the constitutional ban to be read as one against state action only? When is individual action to be treated as state action? And to what degree does the constitutional ban on discrimination authorize legislation providing for "reverse discrimination" or "benign quotas"?[25]

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[21] 302 U.S. 277 (1937).

[22] 335 U.S. 464 (1948).

[23] 368 U.S. 57 (1961).

[24] Title VII, 42 U.S.C. §§ 2000e - 2000e-15 (1964). *See* Phillips v. Martin Marietta Corp., 39 U.S.L.W. 4160 (U.S. Jan. 25, 1971).

The amendment may actually decrease the existing scope of congressional authority. If the phrase "within their respective jurisdictions" is to have any meaning, its effect may be to prohibit congressional interference with matters traditionally left to the states, such as family and domestic relations laws, although currently expanded notions of what Congress may do to regulate interstate commerce and enforce the requirements of equal protection would presently permit federal intervention. Once again, the amendment's legislative history is most unhelpful.

III. CONCLUSIONS

As a step towards full equality of men and women in this society, the proposed "equal rights" amendment covers very little ground. The area of governmentally compelled or sanctioned discrimination against women is very limited and constantly diminishing.[26] Some of the primary planks of the "women's liberation" platform, such as the right to abortion, or to "child care centers," would be totally unaffected by the proposal even in its "unisex" version. Nor is it possible to measure in advance how far even this limited amount of progress will extend, as the conflict between the two disparate objectives of women's rights remains unresolved. The debate over the adoption of the amendment is seriously hampered by its supporters' indecisiveness about its effects and duplicity about its meaning.

If, however, an amendment is to be proposed by Congress, its aims and purposes should be clearly delineated in the legislative history by answers to the questions raised herein. Congress should particularly indicate whether it is fostering a "unisex" approach or one that bars only invidious discrimination against women. My preference is for the latter, which can be accomplished by adding Senator Hayden's language to the present proposal or by shifting its substantive provision to read: "Neither the

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[25] *See* P.B. Kurland, *supra* note 16, at 157-60.

[26] *See generally* President's Commission on the Status of Women, AMERICAN WOMEN (1963); U.S. Women's Bureau, Dept. of Labor, STATUS OF WOMEN IN THE UNITED STATES, 1952, at 9-10; Inter-American Commission on Women, A COMPARISON OF THE POLITICAL AND CIVIL RIGHTS OF MEN AND WOMEN IN THE UNITED STATES, S. DOC. No. 270, 74th Cong., 2d Sess. (1936).

United States nor any State shall make any law that [discriminates against] [imposes disabilities on] women because of their sex."

Better still would be legislation, effectively administered, directed to specific evils in lieu of a broadly directed amendment. Congress and the states already possess sufficient power to alleviate much of the very real discriminations now suffered by women in American society. The "equal rights" amendment would add little, if any, to this power. A protracted struggle for its adoption, however, could spend the public energies needed to effect the exercise of this power. Only martyrs enjoy Pyrrhic victories.

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The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women
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Equity on the Campus: The Limits of Injunctive Regulation of University Protest

Protecting the Subjects of Credit Reports

Review: *Robert Allen Sedler*

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The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women

Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman†

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> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
> Section 3. This amendment shall take effect two years after the date of ratification
>
> Proposed Amendment to the United States Constitution[1]

Introduction

American society has always confined women to a different and, by most standards, inferior status. The discrimination has been deep and pervasive. Yet in the past the subordinate position of more than half the population has been widely accepted as natural or necessary or divinely ordained. The women's rights movement of the late nineteenth and early twentieth centuries concentrated on obtaining the vote for women; only the most radical of the suffragists called into question the assumption that woman's place was in the home and under the protection of man. Now there has come a reawakening and a widespread demand for change. This time the advocates of women's rights are insisting upon a broad reexamination and redefinition of "woman's place."

Historically, the subordinate status of women has been firmly entrenched in our legal system. At common law women were conceded few rights. Constitutions were drafted on the assumption that women did not exist as legal persons. Courts classified women with children and imbeciles, denying their capacity to think and act as responsible adults and enclosing them in the bonds of protective paternalism. Over the last century, it is true, the legal status of women has gradually improved. Common law rules have been altered in many states and some additional rights conferred by legislation. A marked advance was made in 1920 with the adoption of the Nineteenth Amendment granting suffrage to women. Since then, there has been other progress. But the development has been slow and haphazard. Major remnants of the common law's discriminatory treatment of women persist in the

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[1] H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971).

laws and institutions of all states. In addition, efforts during the past century to protect working women have created a new set of laws which turn out to discriminate against women rather than secure equality.[2]

In the present legal structure, some laws exclude women from legal rights, opportunities, or responsibilities. Some are framed as legislation conferring special benefits, or protection, on women. Others create or perpetuate a separate legal status without indicating on their face whether the position of women ranks below, or above, the position of men. Many of the efforts to create a separate legal status for women stem from a good faith attempt to advance the interests of women. Nevertheless, the preponderant effect has been to buttress the social and economic subordination of women.

Our legal structure will continue to support and command an inferior status for women so long as it permits *any* differentiation in legal treatment on the basis of sex. This is so for three distinct but related reasons. First, discrimination is a necessary concomitant of any sex-based law because a large number of women do not fit the female stereotype upon which such laws are predicated. Second, all aspects of separate treatment for women are inevitably interrelated; discrimination in one area creates discriminatory patterns in another. Thus a woman who has been denied equal access to education will be disadvantaged in employment even though she receives equal treatment there. Third, whatever the motivation for different treatment, the result is to create a dual system of rights and responsibilities in which the rights of each group are governed by a different set of values.

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[2] For accounts of the legal status of women in English and American history, see E. Flexner, Century of Struggle (1959); L. Kanowitz, Women and the Law (1969) [hereinafter cited as Kanowitz]; A. Kraditor, Up From The Pedestal (1968); Crozier, *Constitutionality of Discrimination Based on Sex*, 15 Boston U.L. Rev. 723 (1935); Note, *Sex, Discrimination and the Constitution*, 2 Stan. L.Rev. 691 (1950). On the prevalence of discrimination in the American legal system today see, in addition to the above materials, President's Commission on the Status of Women, American Women (1963) and Report of the Committee on Civil and Political Rights (1963); Citizens' Advisory Council on the Status of Women, Report of the Task Force on Family Law and Policy (1968), Report of the Task Force on Health and Welfare (1968), Report of the Task Force on Labor Standards (1968), and Report of the Task Force on Social Insurance and Taxes (1968); The President's Task Force on Women's Rights and Responsibilities, Report: A Matter of Simple Justice (1970); Women's Bureau, U.S. Dept. of Labor, Handbook on Women Workers (1969) [hereinafter cited as 1969 Handbook]; Cavanagh, *"A Little Dearer than His Horse": Legal Stereotypes and the Feminine Personality*, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 260 (1971); Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 Corn. L. Rev. 262 (1970). Recent developments are reported in The Spokeswoman and Women's Rights Law Reporter.

History and experience have taught us that in such a dual system one group is always dominant and the other subordinate. As long as woman's place is defined as separate, a male-dominated society will define her place as inferior.

The structured legal and social discrimination against women is now being challenged by the demand for women's liberation. This movement for equality is made possible by relative affluence, broader educational opportunities for women, and mechanization of industry. It has been given impetus by the weakening of family ties, the growing participation of women in the labor force, increasing life expectancy, and widespread concern about over-population. It accompanies more enlightened and flexible attitudes towards relations between the sexes. And it is allied with the struggles of minorities, youth, and other forces seeking new ways of life, and new ways for people to relate to one another, in a world that has so plainly failed to live up to its possibilities. As a result of these and other factors the movement for equality in the status of women seems on the verge of a major breakthrough.

Nevertheless, it is only recently that widespread discussion has begun about what changes in the legal structure are necessary to achieve a unified system of equality.[3] This article undertakes to contribute to this discussion by exploring in detail some of these necessary changes. We consider first methods by which the legal structure can be changed, reaching the conclusion that a new constitutional amendment is necessary (Part I). We then trace the development in Congress of proposals for such a constitutional amendment (Part II). Thereafter we discuss the constitutional framework of the Equal Rights Amendment: its underlying principles and their place in the general structure of the Constitution (Part III). We then explore some aspects of the transition period after ratification (Part IV), and finally, we describe the anticipated operation of the Amendment in four significant areas: protective labor legislation, domestic relations law, criminal law, and the military (Part V).

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[3] An early and suggestive analysis of legal discrimination against women can be found in Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965). In March, 1970, the Citizens' Advisory Council on the Status of Women, in a memorandum prepared by Mary Eastwood, articulated the outline of a coherent theory of the Equal Rights Amendment; see CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION (1970). Since then, an increasing amount of national attention and scholarly writing has been focused on the Amendment. See *Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 215 (1971); Note, *Sex Discrimination and Equal Protection: Do We Need A Constitutional Amendment?*, 84 HARV. L. REV. 1499 (1971).

I. The Need for a New Constitutional Amendment

There are three methods of making changes within the legal system to assure equal rights for women. One is by extending to sex discrimination the doctrines of strict judical review under the Equal Protection Clause of the Fourteenth Amendment. A second is by piecemeal revision of existing federal and state laws. The third is by a new constitutional amendment. These alternatives are not, of course, mutually exclusive. The basic question is what method, or combination of methods, will be most effective in eradicating sex discrimination from the law.

A. *Extension of the Equal Protection Clause*

In past years many proponents of equal rights for women believed that the goal could be achieved through judicial interpretation of the Equal Protection Clause as applied to both state and federal governments.[4] Thus the President's Commission on the Status of Women argued in 1963 that "the principle of equality [could] become firmly established in constitutional doctrine" through use of the Fourteenth and Fifth Amendments, and concluded that "a constitutional amendment need not now be sought." At the present time that viewpoint has been abandoned by active supporters of women's rights.[5] This shift in position is fully justified. An examination of the decisions of the Supreme Court demonstrates that there is no present likelihood that the Court will apply the Equal Protection Clause in a manner that will effectively guarantee equality of rights for women. More important, equal protection doctrines, even in their most progressive form, are ultimately inadequate for that task.

The Supreme Court's approach to women's rights has been characterized, since the 1870's, by two prominent features: a vague but strong substantive belief in women's "separate place," and an extraordinary methodological casualness in reviewing state legislation based on such stereotypical views of women. The result has been that the Court has never found a sex-based classification to violate the Equal Protection Clause; moreover, it has rendered this cumulative judgment with an off-handedness and tolerance for inconsistency which contrast sharply with its approach to discrimination in the areas of race, national origin, and poverty.

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[4] The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." And the Fifth Amendment Due Process Clause has been construed to embody an equivalent protection against action by the federal government, *see, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954). Both provisions will hereafter be referred to as the "Equal Protection Clause."

[5] The 1963 position of the President's Commission on the Status of Women is stated in AMERICAN WOMEN, *supra* note 2, at 44-45. Two leading advocates of women's rights who switched from judicial interpretation to the amendment as the preferred route of change are Dr. Pauli Murray, a member of the Committee on Civil and Political Rights of the President's Commission on the Status of Women, and Professor Leo Kanowitz, author of WOMEN AND THE LAW (1969). See their testimony before the Senate Committee on the Judiciary on the Equal Rights Amendment in September, 1970, *Hearings on S.J. Res. 61 and S.J. Res 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., at [illegible]81, 427 (1970). Other discussion comparing the treatment of sex discrimination through judicial interpretation and amendment of the Constitution can be found in Note, *supra* note 3, 84 HARV. L. REV. 1499, and *Equal Rights for Women*, *supra* note 3, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 215.

The Supreme Court's conception of women's "separate place" is rooted in its nineteenth-century decisions denying women such elementary civil rights as voting and the opportunity to practice law, on the grounds that these rights were not among the "privileges and immunities" of United States citizenship and hence were subject to exclusive state regulation.[6] In his well-known concurrence in *Bradwell v. Illinois*, the decision which approved the exclusion of women from the legal profession, Justice Bradley stated:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[7]

The question for the Supreme Court in the voting and practice of law cases was not whether women, as compared to similarly situated or qualified men, were being denied a right or privilege in violation of the Equal Protection Clause. The question was not even formulated in these terms, much less considered, because men and women were seen as occupying separate spheres of social life.

The idiom of due process also generally perpetuated the belief in woman's separate place. In *Muller v. Oregon*,[8] one of the first cases to consider at length the constitutional position of women, the Supreme Court accepted the argument made in the famous Brandeis brief (largely prepared by Josephine Goldmark) that women required special protection in employment which could not, under the liberty-of-contract doctrine of *Lochner v. New York*,[9] be extended to men. Strictly speaking, the Court in *Muller* was only holding that the fixing of maximum hours for women by the state was not arbitrary or unreasonable under the Due Process Clause of the Fourteenth Amendment. It did not address itself to whether women were entitled to equal rights with men under the Equal Protection Clause. But the Court's long recitation of the inferior physical capacities and social position of women, its grouping of all members of the sex into one classification regardless of individual differences, and its conclusion that "she is properly placed in a class by herself" had far-reaching consequences for equal protection law.[10]

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[6] *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (voting); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872) and *In re* Lockwood, 154 U.S. 116 (1894) (admission to the bar).

[7] Bradwell v. Illinois, 83 U.S. (16 Wall.) at 141.

[8] 208 U.S. 412 (1908).

Muller has been widely utilized by federal and state courts to sustain not only factory legislation applicable only to women against due process objections, but also many kinds of sex-based laws against equal protection challenges.[11] The basic belief that women were different and that this justified different treatment under law became accepted doctrine, and when the claim for women's rights was at last raised directly under the Equal Protection Clause in 1948, the Court simply applied the style and content of its earlier decisions to the equal protection area as well. In *Goesaert v. Cleary*[12] several women challenged a Michigan statute providing that no female could be licensed as a bartender unless she was "the wife or daughter of a male owner," chiefly on the grounds that the exception was arbitrary and irrational. Justice Frankfurter, speaking for the Court, thought the question "need not detain us long." In putting it to rest he casually answered the broader and much more significant question of whether the state could distinguish at all between men and women in licensing bartenders:

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[9] 198 U.S. 45 (1905).

[10] 208 U.S. at 422. It should be noted that the employer in the case did argue for the invalidity of the statute because "it does not apply equally to all persons similarly situated, and is class legislation." 208 U.S. at 418. But this argument was addressed to the point that the law applied only to certain kinds of establishments and did not cover other kinds where women were employed. It did not raise any issue of *women's* rights under the Equal Protection Clause. Nor did the Court consider this to be the issue.

[11] Cases following *Muller* which sustained employment legislation applicable only to women against due process challenges include Radice v. New York, 264 U.S. 292 (1924), and West Coast Hotel v. Parrish, 300 U.S. 379 (1937); *contra*, Adkins v. Children's Hospital, 261 U.S. 525 (1923) (overruled in West Coast Hotel v. Parrish *supra*). For cases relying on *Muller* to sustain state exclusion of women from overtime work, juries, saloons, occupations, and public universities against equal protection challenges, *see, e.g.*, Ward v. Luttrell, 292 F. Supp. 162 (E.D. La. 1968) (women's equal protection challenge to state maximum hours laws denied), and cases cited in Note, *supra* note 3, 84 HARV. L. REV. at 1504 n.46. *But see* Mengelkoch v. Industrial Welfare Comm'n, 437 F.2d 563 (9th Cir. 1971), *reversing in pertinent part* 284 F. Supp. 950, 956 (C.D. Cal. 1968) (holding that an equal protection challenge to California's maximum hours law for women posed a "substantial constitutional question" requiring the convening of a three-judge district court under 28 U.S.C. § 2281).

[12] 335 U.S. 464 (1948).

> Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogative and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic . . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more that it requires them to keep abreast of the latest scientific standards.[13]

Having reaffirmed the doctrine of woman's separate place, Justice Frankfurter had no difficulty finding a "basis in reason" for the Michigan statute: the legislature might believe that "moral and social problems" would be less when no females except wives and daughters of male bar owners were permitted to be bartenders.[14] The *Goesaert* case thus employed the "reasonable classification" test in considering challenges to sex-based legislation under the Equal Protection Clause; the plaintiff had the burden of overcoming a strong presumption that the sex classification was valid and showing that it was in some way "arbitrary" and "unreasonable." In announcing such a passive standard of equal protection review,[15] the Court delegated to state legislatures almost complete discretion in their treatment of women's basic rights—a discretion which was considered intolerable, at the time *Goesaert* was decided, with regard to many other groups in the population.[16]

While Justice Frankfurter's off-hand dismissal of women's basic civil right to engage in an occupation might seem outrageous today,[17] the

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[13] *Id.* at 465-66.

[14] *Id.* at 466-67. Justices Rutledge, Douglas, and Murphy dissented, but solely on the narrow issue that the statute discriminated against female bar owners; they did not mention the broader equal protection question. Compare the treatment of the rights of women bartenders in Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950).

[15] For a general discussion of the "reasonable classification" test under the Equal Protection Clause, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Developments—Equal Protection*]; another discussion of *Goesaert* can be found in Note *supra* note 3, 84 HARV. L. REV. at 1503-04.

[16] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (strict review of burdens imposed on basis of race and national origins); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (strict review of state law infringing man's right of procreation); Kotch v. Board of River Port Pilot Comm'rs., 330 U.S. 552, 564 (1947) (Rutledge, J., dissenting) (strict review of exclusion of persons from occupation on basis of lineage).

[17] *See* the California Supreme Court's discussion of *Goesaert v. Cleary* and *Muller v. Oregon* in Sail'er Inn, Inc. v. Kirby, — Cal. 3d —, 485 P.2d 529, 539 n.15, 95 Cal. Rptr. 329, 339 n.15 (1971). *Cf.* McCrimmon v. Daley, 2 FEP CASES 971, 972 (N.D. Ill. 11/70); Paterson

Supreme Court has never seriously re-examined its assumption of woman's separate place and the equal protection doctrines that flow from it. In *Hoyt v. Florida*,[18] the most recent Supreme Court case to give extended consideration to women's constitutional rights, the Court upheld a Florida statute which excluded women from jury service unless they voluntarily applied. Justice Harlan's opinion for the Court followed closely the reasoning of *Goesaert*, and even harkened back to Justice Bradley's concurrence in *Bradwell v. Illinois* almost ninety years before.

> [W]e [cannot] conclude that Florida's statute is not "based on some reasonable classification," and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.[19]

Supporters of equal rights for women in the 1960's relied heavily on the possibility that the Supreme Court would at last reject its assumption of woman's separate place and the related reasonable classification test, and apply to sex differentiation cases the standards of strict scrutiny that had evolved in equal protection theory. One such standard is the "fundamental interest" test. Under this formula, if a fundamental right is at stake, differential classification and treatment is permissible only if the government affirmatively demonstrates the most compelling reasons.[20] A second standard of strict scrutiny is the "suspect classification" formula developed in cases reviewing the

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Tavern & Grill Owners Ass'n v. Borough of Hawthorne, 57 N.J. 180, 183-86, 270 A.2d 628, 630-31 (1970). For discussion of these and other cases concerning occupational exclusions of women, see note 111 *infra*.

[18] 368 U.S. 57 (1961).

[19] *Id.* at 61-62. Chief Justice Warren and Justices Black and Douglas concurred in an ambiguous opinion which indicated that they were not passing on the constitutional issue. In two earlier cases the Court had indicated that the exclusion of women from juries was constitutionally permissible; see Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (dictum), and Fay v. New York, 332 U.S. 261, 290 (1947); *but cf.* Ballard v. United States, 329 U.S. 187, 193-94 (1946). The Court has agreed to hear the issue of exclusion of women from state juries again in Alexander v. Louisiana, *cert. granted*, 401 U.S. 936 (1971) (No. 5944).

[20] On the "fundamental interest" test see Shapiro v. Thompson, 394 U.S. 618 (1969); Kramer v. Union Free School District, 395 U.S. 621, 626-30 (1969). For discussion see *Developments—Equal Protection*, *supra* note 15, at 1120-23, 1127-31; Note, *supra* note 3, 84 HARV. L. REV. at 1506-07.

state laws based on racial distinctions. The rule here is that any classification based on race is strongly suspect, "bears a heavy burden of justification," and "will be upheld only if it is necessary, not merely rationally related, to the accomplishment of a permissible state policy."[21]

The fundamental interest and suspect classification doctrines operate to cancel the normal presumption of constitutionality and to put a heavy burden on the government to justify the differential treatment. They are therefore more powerful weapons against discrimination than the "reasonable classification" test. Yet both doctrines are seriously deficient as instruments for achieving equal rights for women. The fundamental interest test applies only where the particular right claimed to be infringed is a "fundamental" one, and the Court has been torn with disagreement over what kinds of rights and interests are embraced within this category of special constitutional protection.[22] Hence the fundamental interest test might not be applied to many important areas in which women are treated differently from men, such as the right to work overtime or to obtain damages for loss of consortium. The suspect classification test provides a potential basis for more comprehensive protection against sex discrimination; under its operation, sex-based classifications would be considered "suspect" and subjected to strict judicial scrutiny. But because this doctrine allows the government to justify even a suspect classification by "compelling reasons," it would permit some classifications based on sex to survive.[23] Thus this standard too would not guarantee an effective system of equality which, as we shall argue, demands the elimination of all such classifications.[24]

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[21] McLaughlin v. Florida, 379 U.S. 184, 196 (1965). *See also* Loving v. Virginia, 388 U.S. 1, 11 (1967). While the suspect classification doctrine has been used most frequently in reviewing racial classifications, it has also been applied to legislative distinctions based on national ancestry and alienage. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); *cf.* Hernandez v. Texas, 347 U.S. 475 (1954). For discussion see *Developments—Equal Protection*, *supra* note 15, at 1087-1120, 1124-27; Note, *supra* note 3, 84 HARV. L. REV. at 1507-16. The California Supreme Court recently overturned a state statute excluding most women from bartending on the grounds that

> classifications based upon sex should be treated as suspect. . . . . Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to the ability to perform or contribute to society.

Sail'er Inn, Inc. v. Kirby, — Cal. 3d —, 485 P.2d 529, 539-40, 95 Cal. Rptr. 329, 339-40 (1971). The suspect classification doctrine was also used in striking down heavier criminal penalties for women than for men in United States *ex rel.* Robinson v. York, 281 F. Supp. 8, 14 (D. Conn. 1968), discussed in note 246 *infra*.

[22] *See, e.g.*, Wyman v. James, 400 U.S. 309 (1971), *id.* at 338 (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471 (1970), *id.* at 508 (Marshall, J., dissenting); Kramer v. Union Free School District, 395 U.S. 621 (1969), *id.* at 634 (Stewart, J., dissenting); Shapiro v. Thompson, 394 U.S. 618 (1969), *id.* at 655 (Harlan, J., dissenting).

[23] As is pointed out in Note, *supra* note 3, 84 HARV. L. REV. at 1509-13, the number

The theoretical problems of achieving equal rights for women through judicial interpretation of the Equal Protection Clause are matched by serious practical difficulties. Whatever hopes were held in the 1960's that the Supreme Court would adopt stricter standards in sex differentiation cases have been undermined by its recent decision in *Williams v. McNair*.[25] *Williams* involved a challenge to sex segregation in the state university system of South Carolina. Under state law all the universities in that system admit both male and female students except two: the Citadel, primarily a military school, is open only to men, and Winthrop College, "a school for young ladies," permits only women to be regular degree candidates. A group of males challenged the sex restriction of Winthrop College on equal protection grounds. A three-judge court dismissed their suit, applying the reasonable classification test and finding that the classification was not "without any rational justification."[26] The Supreme Court, without hearing argument and without opinion, affirmed.[27] This summary disposition of the case, even more peremptory than in *Goesaert*, suggests that the Court is not about to impose strict standards of review in sex classification cases.[28]

Nor does a strong movement for the application of stricter equal protection standards seem to be emerging from decisions in the lower

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and kind of sex-based classifications which would be upheld under a suspect classification standard depend on the burden of justification which the Court requires the state to bear. If the Court requires the state to demonstrate a "perfect match" between the category "woman" and the legislative purpose (such as preventing job-related injuries), few (if any) sex-based laws would survive constitutional review. If, on the other hand, the Court adopts a "balancing" approach, and weighs the extent of legislative "mismatch" against the administrative inconvenience of abolishing the law, the results would be far more favorable to sex-based classifications. *See id.* at 1511-12.

[24] *See* pp. 888-92 *infra*.

[25] 401 U.S. 951 (1971), *aff'g* 316 F. Supp. 134 (D.S.C. 1970).

[26] 316 F. Supp. 134, 138 (D.S.C. 1970).

[27] 401 U.S. 951 (1971).

[28] The Court is continuing, however, to examine sex classifications in certain contexts. It recently granted review in cases which raise issues of sex discrimination in connection with child custody, *In re* Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970), *cert. granted sub nom.* Stanley v. Illinois, 400 U.S. 1020 (1971) (No. 5750); administration of estates, Reed v. Reed, 93 Idaho 511, 465 P.2d 635 (1970), *prob. juris. noted*, 401 U.S. 934 (1971) (No. 430); and exclusion of women from jury venire lists, State v. Alexander, 255 La. 941, 233 So. 2d 891 (1970), *cert. granted sub nom.* Alexander v. Louisiana, 401 U.S. 936 (1971). The Court has also agreed to review two cases involving the imposition on women of their husbands' debts in community property states. See Perez v. Campbell, 421 F.2d 619 (9th Cir. 1970), *cert. granted*, 400 U.S. 818 (1970) (No. 5175) (challenging the suspension of an Arizona woman's driver's license and car registration for debts arising from an accident while her husband was driving the community car); Mitchell v. Commissioner, 430 F.2d 1 (5th Cir. 1970), *cert. granted sub nom.* United States v. Mitchell, 400 U.S. 1008 (1971) (No. 798) (woman's liability for husband's federal income tax).

federal and state courts. In recent years some federal and state courts have struck down legislation or other official action establishing more severe criminal penalties for women than for men, providing for total exclusion of women from jury service, discriminating in the admission of women to the principal state university, excluding most women from bartending, approving the refusal to serve women at a bar, and disallowing suits by women for loss of consortium.[29] On the other hand, federal and state courts have also upheld differences in social security benefits, exclusion of women from juries, exclusion of women from compulsory service in the military, differences in the age of majority, and incapacity to sue for loss of consortium.[30] Some of the language used in the decisions is more sympathetic to women's rights than that of the Supreme Court. But most of it follows the same nineteenth century view of women's status and function in society. There are no signs of theoretical or practical developments that would sweep the Supreme Court in a bold new direction.

On this state of affairs one cannot say that the possibility of achieving substantial equality of rights for women under the Fourteenth and Fifth Amendments is permanently foreclosed. But the present trend of judicial decisions, backed by a century of consistent dismissal of women's claims for equal rights, indicates that any present hope for large-scale change can hardly be deemed realistic.

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[29] Collections of judicial decisions on the validity of sex-based laws may be found in PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS, Appendix B, 47-77 (1963); KANOWITZ, *supra* note 2, at 149-92; Crozier, *Constitutionality of Discrimination Based on Sex*, 15 BOSTON U.L. REV. 723 (1935); Note, *Sex, Discrimination, and the Constitution*, 2 STAN. L. REV. 691 (1950); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778 (1965). The cases referred to in the text as striking down discriminatory laws include: United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968), and Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968) (criminal penalties); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (jury service); Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970) (admission to university); Sail'er Inn, Inc. v. Kirby, — Cal. 3d —, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (exclusion from bartending), discussed in note 21 *supra*; Seidenberg v. McSorley's Old Ale House, Inc., 308 F. Supp. 1253 (S.D.N.Y. 1969) and 317 F. Supp. 593 (S.D.N.Y. 1970) (service at bar); Karczewski v. Baltimore & Ohio R.R., 274 F. Supp. 169 (N.D. Ill. 1967) (loss of consortium). *Cf.* Mengelkoch v. Industrial Welfare Comm'n, 437 F.2d 563 (9th Cir. 1971), discussed in note 11 *supra*.

[30] The cases referred to in the text as upholding discriminatory laws include: Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), *cert. denied*, 393 U.S. 982 (1968) (social security benefits); State v. Hall, 187 So. 2d 861 (Miss. 1966), *appeal dismissed*, 385 U.S. 98 (1966) (jury service); United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968) and United States v. Dorris, 319 F. Supp. 1306 (W.D. Pa. 1970) (Selective Service); Jacobson v. Lenhart, 30 Ill. 2d 225, 195 N.E.2d 638 (1964) (age of majority); Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969) (consortium).

B. *Piecemeal Revision of Existing Laws*

Over the years, some proponents of women's rights have thought sex discrimination could be ended most effectively if legislatures prepared women and men gradually for equality by a series of step-by-step reforms. There is no constitutional obstruction to the elimination of discrimination in our legal system by the piecemeal revision or repeal of existing federal and state laws. However such suggestions unrealistically assume a delicacy and precision in the legislative process which has no relationship to actual legislative capability. More importantly, the process is unlikely to be completed within the lifetime of any woman now alive. Such a method requires multiple actions by fifty state legislatures and the federal congress, by the courts and executive agencies in each one of these jurisdictions, and by similar government authorities in numerous political subdivisions as well. This government machinery would have to be mobilized to repeal or modify the statutes and practices in scores of different areas where unequal treatment now prevails. To be comprehensive such efforts would require a tremendously expensive, sophisticated, and sustained political organization, both nationally and within every state and locality. Campaigns to change the laws one by one could drag on for many years, and perhaps in some areas never be finished.

Even if it were possible to mobilize the nation's political machinery, legislative change alone would fail to provide an adequate foundation for the attainment of full legal equality for women. Any plan for eliminating sex discrimination must take into account the large role which generalized belief in the inferiority of women plays in the present scheme of subordination. As noted above, there is need for a single coherent theory of women's equality before the law, and for a consistent nationwide application of this theory. This is scarcely possible through legislative change alone, for the creation of basic policy would be divided among multiple federal, state, and local agencies.[31] Moreover, so long as they believe the laws against discrimination are subject to derogation at the option of the current legislature, many individuals and institutions will not undertake wholeheartedly the far-reaching changes which genuine sex equality requires. An unambiguous mandate with the prospect of permanence is needed to assure prompt compliance.

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[31] For a discussion of the limits of Congressional power to prohibit sex discrimination in areas traditionally reserved to the states, such as inheritance, domestic relations, and criminal law, see Note, *supra* note 5, 84 Harv. L. Rev. at 1516-18.

In essence, piecemeal legislative reform is what has been going on for the past century. Considered realistically, this approach, at least by itself, simply lacks the breadth, coherence, and economy of political effort necessary for fundamental change in the legal position of women.

C. *The Case for a Constitutional Amendment*

If expansion of the Equal Protection Clause and piecemeal legislation will not result in effective action, there remains the third alternative: a new constitutional amendment. Passage of a new amendment is a serious and difficult step, but we believe that it is a sensible, necessary means of achieving equal rights for women. A major reform in our legal and constitutional structure is appropriately accomplished by a formal alteration of the fundamental document. Claims of similar magnitude, such as the right to be free from discrimination on account of race, color, national origin, and religion, rest on a constitutional basis. The amending process is designed to elicit national ratification for changes in basic governing values, and those who feel that the Supreme Court has gone too far in recent years in effectuating constitutional change through interpretation should especially welcome the amending process.

Many of the reasons why piecemeal legislation is inadequate are also positive advantages in proceeding by amendment. The major political action—passage and ratification of the Amendment—can be accomplished by a single strong nationwide campaign of limited duration. Once passed, the Amendment will provide an immediate mandate, a nationally uniform theory of sex equality, and the prospect of permanence to buttress individual and political efforts to end discrimination. The political and psychological impact of adopting a constitutional amendment will be of vital importance in actually realizing the goal of equality. Discriminatory laws, doctrines, attitudes and practices are set deep in our legal system. They are not easily dislodged. The expression of a national commitment by formal adoption of a constitutional amendment will give strength and purpose to efforts to bring about a far-reaching change which, for some, may prove painful.

There are likewise strong reasons for developing a consistent theory and program for women's equality under the aegis of an independent Equal Rights Amendment, rather than by judicial extension of the

Equal Protection Clause. An amendment that deals with all sex discrimination, and only sex discrimination, corresponds roughly to the boundaries of a distinct and interrelated set of legal relationships. As already noted, woman's status before the law in one area, such as employment, relates both practically and theoretically to her status in other areas, such as education or responsibility for family support. Coming to grips with the dynamics of discrimination against women requires that we recognize the indications of, the excuses for, and the problems presented by women's inferior status. An understanding of these dynamics in any one field informs and enlightens understanding of sex bias elsewhere in the law. This is because, in the past, the legal and social systems have been permeated with a sometimes inchoate, but nevertheless pervasive, theory of women's inferiority.

Moreover, the achievement of equality under the law for women presents its own special problems. These problems differ in many ways from those involved in eliminating discrimination in other spheres where equal protection theory has been applied. They are closest to those which are raised in the area of race discrimination. Yet even here there are significant differences. Women are not residentially segregated from men. The socio-economic connections which link different aspects of sexism are not necessarily the same as those that link the many facets of racism. Women are a majority, not a minority; thus, changes in the status of women may affect most of the population, rather than a small part. Furthermore, without a constitutional mandate, women's status will never be accorded the special concern which race now receives because of the history of the Fourteenth Amendment. For these reasons it is important to have a constitutional amendment directed to this specific area of equality, out of which a special body of new law can be created.

The adoption of a constitutional amendment will also have effects that go far beyond the legal system. The demand for equality of rights before the law is only a part of a broader claim by women for the elimination of rigid sex role determinism. And this in turn is part of a more general movement for the recognition of individual potential, the development of new sets of relationships between individuals and groups, and the establishment of institutions which will promote the values and respect the sensibilities of all persons. Adoption of an Equal Rights Amendment would be a sign that the nation is prepared to accept and support new creative forces that are stirring in our society.

II. The Development in Congress of the Current Proposal

The call for an Equal Rights Amendment is not new in 1971. The Amendment has been introduced in every Congress since 1923, and has been given serious consideration on four occasions: 1946, 1950, 1953, and 1970. The Congressional debates and action on those occasions suggest that while there has often been strong support for an amendment to secure equal rights for women, there has also been doubt and disagreement about the concept of "equality" and about the Amendment's consequent impact on existing laws and institutions. To some extent, this confusion or failure to state clearly the meaning and effect of the Amendment may have been due to political rather than intellectual considerations. In a virtually all male Congress, at a time when consciousness in this country about women's rights was low, the proponents may have wisely refused to be too explicit about the laws and institutions the Amendment would reach. Whatever the reason, however, the debates reveal recurring uncertainty about two questions in particular: how absolute is the Amendment's central principle that "equality of rights shall not be denied or abridged by the United States or by any State on account of sex;" and should the Amendment explicitly exempt certain kinds of laws from its basic principle?[32]

The absoluteness of the Amendment's substantive provisions (which have remained unchanged since 1943) was questioned when the Senate first debated the Amendment in 1946. Although the proponents stood for unified treatment of men and women in the majority of cases, they wanted to create some exceptions. As Senator Pepper said, "[s]ome of us want this record beyond any question of doubt to be distinct that we believe that this amendment . . . would not deprive the legislatures or the Congress of the power to make reasonable classifications in the protection of women."[33] However, the proponents were unable to translate this policy into concrete guidelines which could distinguish "reasonable" from "unreasonable" classifications.

The question of whether exceptions should be explicitly written into the Amendment was raised when the Senate next debated the Amendment in 1950 and 1953. On both occasions Senator Hayden succeeded in amending the Equal Rights Amendment to provide that "[t]he provisions of this article shall not be construed to impair any rights, benefits, or exemptions conferred by law upon persons of the female sex."[34] Senator Hayden felt that women, in order to be equal, needed more and different "rights" than men possessed. He defined "rights" of women to mean only the benefits and privileges of citizenship; the duties of citizenship, in contrast, women could not be expected to perform. The proponents of the Equal Rights Amendment failed to counter this conception of a dual legal system with an alternative view that men and women should have equality on the same terms. As limited by Senator Hayden's resolution, the Equal Rights Amendment passed the Senate in both 1950 and 1953, but the House did not follow up on the Senate's action.[35]

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[32] This section deals with a few central theoretical issues which have persisted throughout the debates on the Amendment; it is not a detailed account of the formal legislative history of the Amendment. References to the resolutions, hearings, reports, and debates on the Amendment are given in a table in an Appendix to this article.

[33] 92 CONG. REC. 9313 (1946).

The related issues of absoluteness and exceptions which were prominent in the earlier debates arose again in the very different theoretical and political context of 1970. The work and support of the Citizens' Advisory Council on the Status of Women, and other organizations, provided the Amendment's sponsors in the 91st Congress with a more coherent approach than had previously been articulated. Representative Martha Griffiths and Senators Birch Bayh and Marlow Cook presented the Amendment as a broad mandate for the unified treatment of women and men; the only qualifications of the principle, they suggested, would be based on compelling social interests, such as the protection of the individual's right of privacy and the need to take into account objective physical differences between the sexes.[36] There was some disagreement among the proponents, however, about the concrete impact of the Amendment on existing laws, particularly the Selective Service Act, and in this area the traditional debate about absoluteness and exceptions reappeared. Representative Griffiths said in the House that under the Equal Rights Amendment women would be required to serve in the Armed Forces, though, as is true of men, only in positions for which they were fitted.[37] Senator Bayh, sensing strong opposition in the Senate to the drafting of women, argued that the Amendment would allow Congress to exempt women from military service on the ground of "compelling reasons" of public policy.[38] Senator Sam Ervin was not convinced, and successfully offered an amendment, in the tradition of Senator Hayden's limitations, providing: "This article shall not impair, however, the validity of any law of the United States which exempts women from compulsory military service."[39] Although the Equal Rights Amendment had passed overwhelmingly in the House, acceptance of the Ervin amendment in the Senate effectively blocked final passage during the 91st Congress.[40]

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[34] 96 Cong. Rec. 738 (1950).

[35] In 1950, Senator Kefauver proposed that equal rights be attained through legislation rather than amendment. He offered a bill which would have created a commission to survey the laws and report to Congress, which would then take action. The standard which he had in mind for the formulation of laws would have permitted protective legislation and other special laws for women to stand. The bill was defeated, 18-65. 96 Cong. Rec. 724, 755-61, 872 (1950).

[36] 116 Cong. Rec. 7948, 7953 (daily ed. Aug. 10, 1970); 116 Cong. Rec. 17631-36, 17639-51 (daily ed. Oct. 9, 1970).

[37] 116 Cong. Rec. 7953-54 (daily ed. Aug. 10, 1970).

The long and frustrating history has left many points in uncertainty. All the issues have never been raised in any one year, and while there may have been consensus on a point in one debate, it often vanished when the issue was discussed again years later. The articulation of a clear and cohesive position on the meaning and impact of the proposal, which would furnish a basis for legislative debate and provide a guide to future interpretation, has not emerged from prior Congressional consideration of the Equal Rights Amendment. We turn, therefore, to a consideration of the basic legal principles which the Amendment, as presently conceived, must be deemed to establish in our constitutional structure.

III. The Constitutional Framework

The Equal Rights Amendment embodies fundamental principles which are derived from the purposes the Amendment is designed to achieve, the operational conditions necessary to attain those objectives, and the existing context of constitutional doctrine. It is not possible here to do more than examine these principles in a general and preliminary way. They can be fully developed only by the usual process of constitutional adjudication.[41]

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[38] 116 Cong. Rec. 17341 (daily ed. Oct. 7, 1970); 116 Cong. Rec. 17792 (daily ed. Oct. 12, 1970).

[39] 116 Cong. Rec. 17780-81 (daily ed. Oct. 12, 1970).

[40] It is interesting to note that this issue, which proved so decisive and destructive of the Amendment in 1970, had been discussed and considered settled among the proponents in the 1950 debate. Senator Cain, a supporter, had said that the Amendment would mean that women would be drafted and assigned jobs based on their individual capacities and the needs of the country. 90 Cong. Rec. 760-61 (1950). With a war just behind them and the specter of an atomic one facing them, Congress could foresee a need for women in the armed forces. Now the idea of compulsory military service for women seems outrageous to some senators.

[41] Discussions of the legal foundations of equal rights for women which we have found particularly helpful, and upon which we have attempted to build in this article, include Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232 (1965); Citizens' Advisory Council on the Status of Women,

A. *The Basic Principle*

The basic principle of the Equal Rights Amendment is that sex is not a permissible factor in determining the legal rights of women, or of men. This means that the treatment of any person by the law may not be based upon the circumstance that such person is of one sex or the other. The law does, of course, impose different benefits or different burdens upon different members of the society. That differentiation in treatment may rest upon particular characteristics or traits of the persons affected, such as strength, intelligence, and the like. But under the Equal Rights Amendment the existence of such a characteristic or trait to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic or trait. Likewise the law may make different rules for some people than for others on the basis of the activity they are engaged in or the function they perform. But the fact that in our present society members of one sex are more likely to be found in a particular activity or to perform a particular function does not allow the law to fix legal rights by virtue of membership in that sex. In short, sex is a prohibited classification.

This principle is already widely accepted with respect to many activities. To take an example, virtually everybody would consider it unjust and irrational to provide by law that a person could not be admitted to the practice of law because of his or her sex. The reason is that admission to the bar ought to depend upon legal training, competence in the law, moral character, and similar factors. Some women meet these qualifications and some do not; some men meet these qualifications and some do not. But the issue should be decided on an individual, not a group, basis. And in such a decision, the fact of being male or female is irrelevant. This remains true whether or not there are more men than women who qualify. It likewise would remain true even if there were no women who presently were qualified, because women potentially qualify and might do so under different conditions of education or upbringing. The law owes an obligation to treat females as persons, not statistical abstractions.

What is true of admission to the bar is true of all forms of legal rights. If we examine the various areas of the law one by one most of us will reach the same conclusion in each case. Sex is an inadmissible category by which to determine the right to a minimum wage,

THE PROPOSED EQUAL RIGHTS AMENDMENT TO THE UNITED STATES CONSTITUTION (1970); and the testimony of several witnesses in *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

the custody of children, the obligation to refrain from taking the life of another, and so on. The law should be based on the right to a living wage for each person, the welfare of the particular child, the protection of citizens from murder, and not on a vast overclassification by sex.

This basic principle of the Equal Rights Amendment derives from two fundamental judgments inherent in the decision to eliminate discrimination against women from our legal system. First, the Amendment embodies the moral judgment that women as a group may no longer be relegated to an inferior position in our society. They are entitled to an equal status with men. This moral decision implies a further practical judgment—that such an equal status can be achieved only by merging the rights of men and women into a "single system of equality." By this we mean that the decision to eliminate women's historically inferior social position requires the prohibition of sex classification in the law. We reject an alternative conception of "equality"—that women's separate place should be "upgraded" in social status and material rewards. As already noted, such a dual system, in which women would have a different but "equal" status, has proven to be illusory. There is no reason to suppose that the present inferior status of women would materially change through adoption of a constitutional amendment which attempted to maintain a dual system of sex-based rights and responsibilities.

Second, the basic principle of the Equal Rights Amendment flows from the set of moral and practical judgments that have been made with respect to the fundamental rights of the individual in our society. Classification by sex, apart from the single situation where a physical characteristic unique to one sex is involved (as will be discussed in the next subsection), is always an overclassification. A permissible legislative goal is always related to characteristics or functions which are or can be common to both sexes. But in a classification by sex all women or all men are included or excluded regardless of the extent to which some members of each sex possess the relevant characteristics or perform the relevant function. Such a result is in direct conflict with the basic concern of our society with the individual, and with the rights of each individual to develop his or her own potentiality. It negates all our values of individual self-fulfillment.

To achieve the values of group equality and individual self-fulfillment, the principle of the Amendment must be applied comprehensively and without exceptions. Arguments that administrative efficiency or other countervailing interests justify limiting the Amendment contradict its basic premises.

First, the decision to protect the value of individual self-fulfillment embraces the judgment that efficiency in government operations is not a sufficient reason to ignore individual differences. In other words, the government cannot rely upon the administrative technique of grouping or averaging where the classification is by sex. There are some situations where it is permissible for the law to operate on the basis of groups or averages. For example, individuals can be classified by age—under 21 or over 65—even though there are individual differences as to maturity or senility.[42] In such cases individual rights are sacrificed to administrative efficiency. But the Equal Rights Amendment makes the constitutional judgment that this is not acceptable where the factor of sex is concerned. Here, whatever the price in efficiency, the classification must be made on some other basis.[43]

Examples of this judgment appear frequently in our law today. Thus the assertion that some women leave jobs to marry or to move with their husbands does not constitute ground for discrimination on account of sex in government employment under Executive Order 11478, or in private employment under Title VII of the Civil Rights Act of 1964.[44] A balance of values has been struck. The decision has been made not to penalize all women because of a behavior pattern characteristic of some women. And any greater efficiency in a classification based on sex, rather than on an individual basis, has been excluded as a justifying factor. The Equal Rights Amendment makes the same judgment, but on a broader scale and in constitutional terms.[45]

Second, the Equal Rights Amendment embodies the moral and practical judgment that the prohibition against the use of sex as a basis for differential treatment applies to all areas of legal rights. To the extent that any exception is made, the values sought by the Amendment are undercut; women as a group are thrust into a subordinate status and women as individuals are denied the basic right to be considered in terms of their own capacities and experience. And, as noted above, the interrelated character of a system of legal equality for the sexes makes a rule of universal application imperative. No one exception, resulting in unequal treatment for women, can be confined in its impact to one area alone. Equal rights for women, as for races, is a unity.

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[42] *But see* Note, *Too Old To Work: The Constitutionality of Mandatory Retirement Plans*, 44 S. Cal. L. Rev. 150 (1970).

[43] It seems highly probable that, as to most characteristics which the law takes into account, the differences within each sex are greater than the differences in average between the sexes. The justification for the Equal Rights Amendment, however, stands without regard to this factual assumption.

[44] Executive Order 11478, 3 C.F.R. 133 (1969 Comp.), 42 U.S.C. § 2000e (Supp. V, 1969); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1964).

[45] For discussion of the problem as it arises in the determination of insurance rates based on statistical differences between men and women, see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1172-76 (1971) [hereinafter cited as *Developments—Title VII*].

A third, equally decisive consideration leads to the same conclusion. There is no objective basis available to courts or legislatures upon which differential treatment of men and women could be evaluated. As already pointed out, such judgments can be made only in terms of a dual system of rights, the rights of women being grounded in one set of values and the rights of men in another. Not only is such a system inevitably repressive of one group, but it affords no standard of comparison between groups. For example, in *Hoyt v. Florida*[46] the Supreme Court accepted a value system for women which viewed them as "the center of home and family life," and undertook to be "fair" to women by excusing them from jury service, a "benefit" not given to men. Upon what basis can it be said, however, that this outcome puts men and women upon a level of "equality"? Nor did the Court, in making that decision, attempt to weigh the countless other legal differentiations between the sexes in order to strike an overall balance of "equality."

Fourth, the judgment as to whether differential treatment is justified or not would rest in the hands of the very legislatures and courts which maintain the existing system of discrimination. The process by which they make that judgment involves the same discretionary weighing of preferences as has resulted in the present inequality. This is true whether the standard of judging is "reasonable classification," "suspect classification," or "fundamental interest." There is no reason to believe that such a decision-making apparatus will end up in a substantially different position from what we have now. Only an unequivocal ban against taking sex into account supplies a rule adequate to achieve the objectives of the Amendment.

From this analysis it follows that the constitutional mandate must be absolute. The issue under the Equal Rights Amendment cannot be different but equal, reasonable or unreasonable classification, suspect classification, fundamental interest, or the demands of administrative expediency. Equality of rights means that sex is not a factor. This at

[46] 368 U.S. 57 (1961). This case is discussed at p. 879 *supra*.

least is the premise of the Equal Rights Amendment. And this premise should be clearly expressed as the intention of Congress in submitting the Amendment to the states for ratification.

It is argued that this position is naive, impractical, and leads to absurd results. Various examples of supposedly outlandish consequences are given. Most of these examples, such as those relating to public toilet facilities, are dramatic but are diversions from the major issues. On the central problems—property rights, marriage and divorce, the right to engage in an occupation, freedom from discrimination in employment and education—the burden of persuasion is on those who would impose different treatment on the basis of sex. Before a judgment on the feasibility of the Equal Rights Amendment can be made, however, it is necessary to pursue the legal analysis somewhat further.

B. *Laws Dealing with Physical Characteristics Unique to One Sex*

The fundamental legal principle underlying the Equal Rights Amendment, then, is that the law must deal with particular attributes of individuals, not with a classification based on the broad and impermissible attribute of sex. This principle, however, does not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. In this situation it might be said that, in a certain sense, the individual obtains a benefit or is subject to a restriction because he or she belongs to one or the other sex. Thus a law relating to wet nurses would cover only women, and a law regulating the donation of sperm would restrict only men. Legislation of this kind does not, however, deny equal rights to the other sex. So long as the law deals only with a characteristic found in all (or some) women but *no* men, or in all (or some) men but *no* women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex. Hence such legislation does not, without more, violate the basic principle of the Equal Rights Amendment.

This subsidiary principle is limited to *physical* characteristics and does not extend to psychological, social or other characteristics of the sexes. The reason is that, so far as appears, it is only physical characteristics which can be said with any assurance to be unique to one sex. So-called "secondary" biological characteristics and cultural characteristics are found to some degree in both sexes. Thus active or passive attitudes, or interests in literature or athletics, like degrees of physical strength or weakness, appear in members of each sex. Differences in treatment attributable to such shared traits must be based upon their existence in the individual, not upon a classification by sex.

Instances of laws directly concerned with physical differences found only in one sex are relatively rare. Yet they include many of the examples cited by opponents of the Equal Rights Amendment as demonstrating its nonviability. Thus not only would laws concerning wet nurses and sperm donors be permissible, but so would laws establishing medical leave for childbearing (though leave for child*rearing* would have to apply to both sexes). Laws punishing forcible rape, which relate to a unique physical characteristic of men and women, would remain in effect. So would legislation relating to determination of fatherhood.

Application of this subsidiary principle raises questions which should be carefully scrutinized by the courts. For one thing, while differentiation on the basis of a unique physical characteristic does not impair the right of a man or a woman to be judged as an individual, it does introduce elements of a dual system of rights. That result is inevitable. Where there is no common factor shared by both sexes, equality of treatment must necessarily rest upon considerations not strictly comparable as between the sexes. This area of duality is very limited and would not seriously undermine the much more extensive areas where the unitary system prevails. But the courts should be aware of the danger.

The danger is increased by the possibility of evasion in the application of the subsidiary principle. Unless that principle is strictly limited to situations where the regulation is closely, directly and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex. A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge would look to a series of standards of relevance and necessity. These standards are the ones courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights. It is possible to identify at least six factors that a court would weigh in determining whether the necessary close, direct, and narrow relationship existed between the unique physical characteristic and the provision in question.

These factors can be explained most easily in terms of a hypothetical case: a government regulation to reduce absenteeism at policy-making levels by barring women from certain jobs. Such a regulation might be defended by the government as being based on a unique physical characteristic of women, namely, the potential for becoming pregnant, and the consequent need for leaves of absence for childbearing.[47] In considering whether to sustain this rule, a court would weigh the following factors on the basis of factual evidence presented by the party attempting to justify the regulation:

First, the proportion of women who actually have the characteristic in question. In this case, the issue would be the number of women eligible for the jobs who were actually capable of becoming pregnant.

Second, the relationship between the characteristic and the problem. In this example, the court would inquire about the proportion of women who were likely actually to become pregnant and also choose to bear the child; the length of time most women would require for childbearing; and the extent to which a leave of this duration would actually interfere with an important governmental function.

Third, the proportion of the problem attributable to the unique physical characteristic of women. Here the court would consider the fact that only a small proportion of the total problem of long-term absenteeism and job transfer was caused by pregnancy; it would inquire into the proportion which was attributable to other factors, such as military duty, political disagreements, childrearing, job mobility, and disability due to illness or accidents, all of which cause absenteeism among workers of both sexes.

Fourth, the proportion of the problem eliminated by the solution. Here it would seem clear that the solution of not hiring women would eliminate absenteeism caused by pregnancy, but as indicated in the third factor, this would only be a small proportion of the overall problem of absenteeism.

Fifth, the availability of less drastic alternatives. "Less drastic" in this sense may mean first, less onerous to the person being restricted; second, more limited in the number of persons or opportunities affected; or third, not based on sex at all, or "sex neutral." To determine whether less drastic alternatives were available to deal with the problem, the court would inquire into the feasibility of individualized procedures for screening out those who were likely to be absent, and the possibility of alternative devices such as job pairing and substitution.[48]

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[47] The possibility that a woman who became a mother might leave the workforce altogether for child*rearing* is not based on a unique physical characteristic of women, and therefore would not even be considered in relation to the unique physical characteristics tests.

[48] One commentator has suggested that at least in the First Amendment area, the doctrine of "less drastic means" has little viability beyond traditional legal assumptions about the impact of vague criminal statutes. *See* Note, *Less Drastic Means and the*

Sixth, the importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution. Here the question would be the seriousness of the harm and dislocation that would actually result if an employee in one of the covered positions were absent for the length of time necessary for childbearing. The problem as thus measured would be balanced against the costs of the solution, in this case the continuation of sexual stereotyping and overbroad discrimination that would be caused by excluding all women from the jobs covered by the regulation.

How the courts would balance each of these factors is difficult to predict in advance of actual adjudication, although in the example given it is obvious that the combined weight of the overbroad classification by sex and the marginal relationship of the unique physical characteristic of pregnancy to the problem of absenteeism would require invalidation of the regulation. In any case, all of these considerations are of the kind that courts constantly deal with in similar cases where reliance upon a legitimate factor is used to achieve illegitimate ends. And however the borderline cases are resolved, the margin of error is not likely to be so large as to jeopardize the basic principle.

C. *Classifications Based on Attributes Which May Be Found in Either Sex*

Classifications are a necessary part of lawmaking and the Equal Rights Amendment does not, of course, require an end to all classifications based on recognition of the differences among people. The Amendment forbids the use of sex as a basis for legal differentiation, but it permits the legislature to continue to classify on the basis of real differences in the life situations and characteristics of individuals. It is important to keep in mind the nature and uses of these legitimate classifications as well as to note the possibility of their being employed to evade or nullify the prohibition against sex classification.

As pointed out above, classifications based upon sex necessarily include members of one sex who should not be covered, or exclude

First Amendment, 78 YALE L.J. 464, 472-74 (1969). On the other hand, the U.S. Court of Appeals for the District of Columbia Circuit has used the concept of less drastic means in reviewing the problems of confinement in mental institutions; *see* Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969), and Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966). See also the development of judicial concepts of "job validation" of tests under Title VII in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and cases discussed in *Developments—Title VII*, *supra* note 45, at 1120-1140.

members of the other sex who should be covered, by a given law. Unfortunately, legislatures have traditionally used sex classifications as shorthand for other classifications which, although they are more precise, are also somewhat more difficult to administer. Because sex classifications were acceptable, they were often employed merely because members of one sex actually or apparently predominated in the smaller group to whom the law was really directed, whether or not a narrower more equitable classification was practicable. This common practice reinforced the pre-existing majority of one sex in the regulated or protected activity; for example, if only women can get extensive leaves for childrearing, it becomes economically impossible for men to stay home to care for children while their wives work. Hence sex classifications begin to seem both natural and essential to sound legislation in many areas of public concern.

Elimination of sex classifications by the Equal Rights Amendment, however, does not prohibit the legislature from achieving legitimate purposes by other methods of classification. In 1965, Pauli Murray and Mary Eastwood proposed the substitution of realistic "functional" classifications for sex classification. They argued that:

> If laws classifying persons by sex were prohibited by the Constitution, and if it were made clear that laws recognizing functions, *if performed*, are not based on sex per se, much of the confusion as to the legal status of women would be eliminated.[49]

This analysis need not be limited to literal "functions." It also applies to classifications based on prior education and training, experience, skills, or other measurable traits and abilities. The term "functional classifications" can thus be used to refer to all non-sex-based classifications.

A legislature taking this approach would make laws which reflected and related to the changing reality of individual lives and potentials, regardless of sex, instead of legislating women into conformity with each other, and pretending that all men are different from all women in terms of a given legislative purpose. For example, a legislature could use a non-sex-based classification to provide job retraining to the class of individuals who had been absent from the labor force for a specified number of years, for whatever reason. The functional basis would allow both men and women in that situation to get necessary encouragement to re-enter the labor force, unlike a blanket sex preference which would unfairly select out for special treatment individuals of one sex to the exclusion of the other. Likewise, a rule allowing workers to take sick leave when any member of their household was sick would be an appropriate functional classification. Unlike a rule allowing such leave only to mothers, which denies parents the opportunity to choose which of them will stay home, the functional rule is neutral, allowing workers to choose whether they wish to follow traditional sex-roles or share childrearing and other familial responsibilities. A system of functional classification may thus be utilized in ways which achieve important social objectives without discriminating against individuals on account of their sex.

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[49] Murray & Eastwood, *supra* note 3, at 241.

On the other hand such classifications, though formulated without explicit sex reference, may in practice fall more heavily on one sex than the other. This opens the possibility that non-sex-based classifications can be used to circumvent the Equal Rights Amendment. The fact that women's life situations, on the average, are different from those of men, partly or largely because of past discrimination, makes such an outcome more than a remote possibility. For example, today most women have little choice about whether or not to give up full-time jobs outside the home in order to care for any children they bear, at least while the children are young. This lack of choice is one important reason why women predominate among the housekeepers and childrearers of our society. Consequently, to use a modified form of our previous example, a law might prohibit adults with primary responsibility for child care from working in managerial jobs, on the grounds that the function of caring for children was inconsistent with substantial occupational responsibility. Such a law or government regulation would constitute a serious evasion of the Equal Rights Amendment. Its practical effect would be to exclude the majority of women and very few men in certain age groups from a whole range of relatively well-paid jobs which most people consider desirable.

The problem of formally neutral laws which may have a discriminatory impact arises under any law which attempts to eradicate discrimination based upon a single prohibited factor in a context where many other factors may legitimately be taken into account. The same issues have consistently appeared in the enforcement of laws prohibiting discrimination because of race, religion, national origin, and labor organizing activity. The courts have responded by looking beyond the adoption of the "neutral" classification into the realities of purpose, practical operation, and effect. Where the classification is seen to be a subterfuge, or to nullify the objectives of the anti-discrimination law, the courts have not hesitated to strike it down. As one court has stated:

> A procedure may appear on its face to be fair and neutral, but if in its application a discriminatory result ensues, the procedure may be constitutionally impermissible.[50]

And recently the Supreme Court, in holding a North Carolina literacy test invalid under the Voting Rights Act of 1965, said:

> From this record we cannot escape the sad truth that throughout the years Gaston County systematically deprived its black citizens of the educational opportunities it granted to its white citizens. "Impartial" administration of the literacy test today would serve only to perpetuate these inequities in a different form.[51]

In applying these principles to the Equal Rights Amendment the courts would follow standards similar to those set forth in the preceding section with respect to laws which propose to base differentiation upon a unique physical characteristic of one sex. Of those standards, only one would be different for functional classifications. Since a functional classification is necessarily limited to those individuals who actually perform a given task or share a given characteristic, the first question—the proportion of women who actually have the characteristic in question—would not be asked by the reviewing court. However, unlike unique physical characteristic classifications, in which by definition some or all of one sex and none of the other are included, the extent of the disproportion between the numbers of women and the numbers of men included in a functional class may vary. A given functional classification may include 100,000 women and 10 men, or a disproportion of 10,000 to 1, while another may affect 45,000 women and 40,000 men, or a disproportion of 9 to 8. The first classification would obviously be a more likely vehicle for perpetuating sex inequality than the second, and the presence of this factor would thus go far to weight the balance against the law.

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[50] Penn v. Stumpf, 308 F. Supp. 1238, 1244 (N.D. Cal. 1970).

[51] Gaston County v. United States, 395 U.S. 285, 296-97 (1969). Other cases invalidating ostensibly neutral classifications which operated to discriminate against the right of blacks to vote include Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Pupil assignment laws, under which assignment of students to schools is ostensibly based upon non-racial factors, have not been allowed to operate so as to maintain segregation of races in the school system. See Green v. County School Board, 391 U.S. 430 (1968); United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967). For rejection of an ostensibly neutral classification which abridged freedom of religion, see Sherbert v. Verner, 374 U.S. 398 (1963). On "neutral" classifications which operate to discriminate against blacks in employment, see Griggs v. Duke Power Co., 401 U.S. 424 (1971). Generally on the problem see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

Protection against indirect, covert or unconscious sex discrimination is essential to supplement the absolute ban on explicit sex classification of the Equal Rights Amendment. Past discrimination in education, training, economic status and other areas has created differences which could readily be seized upon to perpetuate discrimination under the guise of functional classifications. The courts will have to maintain a strict scrutiny of such classifications if the guarantees of the Amendment are to be effectively secured.

D. *The Privacy Qualification*

The Equal Rights Amendment must take its place in the total framework of the Constitution and fit into the remainder of the constitutional structure. Of particular importance for our purposes is the relation of the new amendment to the constitutional right of privacy.

In *Griswold v. Connecticut*[52] the Supreme Court recognized an independent constitutional right of privacy, derived from a combination of various more specific rights embodied in the First, Third, Fourth, Fifth and Ninth Amendments. This constitutional right of privacy operates to protect the individual against intrusion by the government upon certain areas of thought or conduct, in the same way that the First Amendment prohibits official action that abridges freedom of expression. Thus in the *Griswold* case the right was held to invalidate a Connecticut statute which prohibited the use of contraceptives even by married couples and thereby infringed upon intimate relationships in marriage and the home. The position of the right of privacy in the overall constitutional scheme was not explicitly developed by the Court. Presumably the point at which the right of privacy cuts off state regulation will be determined by a test which balances the two interests at stake. Or it may be that the right of privacy, where found to be applicable, will be held to afford an absolute protection against government intrusion. In either event laws or other official action implementing the Equal Rights Amendment would have to be applied in a manner that was consistent with individual privacy under the constitutional guarantee.[53]

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[52] 381 U.S. 479 (1965).

[53] The balancing test for the right of privacy is used by Mr. Justice Goldberg in

The exact scope of the right of privacy was likewise not spelled out by the Court in the *Griswold* case. Yet it is clear that one important part of the right of privacy is to be free from official coercion in sexual relations. This would have a bearing upon the operation of some aspects of the Equal Rights Amendment. Thus, under current mores, disrobing in front of the other sex is usually associated with sexual relationships. Hence the right of privacy would justify police practices by which a search involving the removal of clothing could be performed only by a police officer of the same sex as the person searched.[54] Similarly the right of privacy would permit the separation of the sexes in public rest rooms, segregation by sex in sleeping quarters of prisons or similar public institutions, and appropriate segregation of living conditions in the armed forces.

In such situations, the facilities provided for the sexes would have to be equal in quality, convenience and other respects. Likewise an employer could not refuse to hire women because he did not want to build or remodel rest rooms for them. Failure to provide separate facilities for one sex would not be permissible when the presence of such facilities is related to the exercise of some other right, such as the right to be free of discrimination in employment. Moreover, the separation of facilities for reasons of privacy would not mean that individuals or groups would be foreclosed from making flexible and various arrangements for the common use of facilities such as bathrooms. In the same way, hospitals could allow patients to choose a ward with individuals of the same sex or of both sexes. Such noncoerced decisions, springing from individual values and preferences in areas of private conduct, would not be affected by the Amendment.

It is impossible to spell out in advance the precise boundaries that the courts will eventually fix in accommodating the Equal Rights Amendment and the right of privacy. In general it can be said, however, that the privacy concept is applicable primarily in situations which involve disrobing, sleeping, or performing personal bodily functions in the presence of the other sex. The great concern over these matters expressed by opponents of the Equal Rights Amendment seems not only to have been magnified beyond all proportion but

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his concurring opinion, Griswold v. Connecticut, 381 U.S. 479, 486 (1965). For discussion of the full protection or absolute approach see T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 544-550 (1970).

[54] The constitutional right of privacy in the search situation was recognized in York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

to have failed to take into account the impact of the young, but fully recognized, constitutional right of privacy.

It should be added that the scope of the right of privacy in this area of equal rights is dependent upon the current mores of the community. Existing attitudes toward relations between the sexes could change over time—are indeed now changing—and in that event the impact of the right of privacy would change too.

E. *Separate-But-Equal, Benign Quotas, and Compensatory Aid*

In the field of equal protection law, particularly as it deals with discrimination on account of race, various other questions of constitutional interpretation have been presented for judicial determination. The most important of these are the separate-but-equal doctrine, the benign quota, and compensatory aid. Similar issues might arise under the Equal Rights Amendment.

1. *Separate-But-Equal*

The separate-but-equal doctrine in race relations was established in *Plessy v. Ferguson* in 1896 and abandoned in *Brown v. Board of Education* in 1954. It has been suggested that a similar principle might be acceptable in sex relations in those situations, such as separate dormitory facilities in a university or separate toilet facilities in public buildings, where separation carries no implication of inferiority for either sex. A broader application of the doctrine is also conceivable, as in the field of education.[55]

Under the analysis here proposed, however, the separate-but-equal doctrine would have no place in the Equal Rights Amendment. It would simply operate to perpetuate a dual system of equality, different but not equal. Essentially the separate-but-equal doctrine is a device for keeping one group in a subordinate position. This is particularly true where the separated group, by virtue of past subordination, starts from a generally weaker position, with fewer opportunities, less training, and fewer material and institutional resources. Experience has shown, furthermore, that in practice separate-but-equal is rarely in fact equal.

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[55] Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Education, 347 U.S. 483 (1954). The suggestion concerning dormitories and toilet facilities is made in Murray & Eastwood, *supra* note 3, at 240. On the application of the separate-but-equal doctrine to universities, see Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184, 187-88 (E.D. Va. 1970).

The question of separate facilities for personal living is more appropriately solved by application of the privacy doctrine. Use of the privacy principle not only focuses attention on the real issue but avoids the necessity of determining whether different treatment imposes or implies inferiority. In all other contexts—such as public education and employment—the separate-but-equal doctrine is open to the same objections when employed in connection with sex relations as it is in race relations.

It should be noted that the Equal Rights Amendment applies only to government action, both state and federal. Separation of the sexes in the private sector is not foreclosed. Hence separate social, recreational, cultural or other facilities, so long as they do not affect areas of public concern, are available for those who wish to create them. As to facilities provided or subsidized by the government, however, the separate-but-equal doctrine is wholly inconsistent with the principles and objectives of the Equal Rights Amendment.[56]

2. *Benign Quotas and Compensatory Aid*

In the area of equal rights for women, as in other areas of equal rights, problems may arise of assuring equality in practice as well as in legal theory. The question then becomes whether or not the government can take sex into account in acting affirmatively to support the system of equal rights.

In the field of race relations various methods for taking affirmative action to secure actual, as well as theoretical, equality have been employed. One is the benign quota. As used in attempting to maintain integrated housing projects, this device establishes a quota for each race on the theory that once the percentage of one race gets beyond a "tipping point" members of the other race will not enter or stay in the project. Quotas have also been utilized in other areas, such as employment and education, to assure that a minimum number of the minority group will receive work or training. Other kinds of affirmative action consist of some form of compensatory aid. This involves special assistance to members of one race in order to give them the education, training or other help that will put them more quickly on a level of equality with the other race. The benign quota may result in denial of benefits to individual members of either group on account of their race; compensatory aid may deny benefits to members of the majority group on account of race.

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[56] Drawing the line between the public and private sectors involves the concept of "state action," discussed at pp. 905-07 *infra*.

The Supreme Court has not passed on the constitutional issues raised by these devices. It is not improbable, however, that in the field of race relations they will be sustained. In equal protection theory, while classification by race would be "suspect," it is not totally prohibited. And where the courts determine that the purpose of the differentiation is to benefit members of the minority race, rather than impose a status of inferiority, they are likely to find there are "compelling reasons" for the special treatment.[57] Such an approach would not be permissible under the Equal Rights Amendment. For reasons already stated, the guarantee of equal rights for women may not be qualified in the manner that "suspect classification" or "fundamental interest" doctrines allow.

This does not mean, however, that the government would be powerless to take measures designed to assure women actual as well as theoretical equality of rights. Authority to remedy the effects of past discriminations as well as to implement the provisions of the Equal Rights Amendment is available and unquestioned. Thus the courts have power to grant affirmative relief in framing decrees in particular cases. As in racial desegregation cases, such decrees could provide remedies for past denial of equal rights which take into account sex factors and give special treatment to the group discriminated against. Similar remedial measures, on a broader scale, could also be the subject of legislative action. This form of affirmative action may appear, paradoxically, to conflict with the absolute nature of the Equal Rights Amendment. But where damage has been done by a violator who acts on the basis of a forbidden characteristic, the enforcing authorities may also be compelled to take the same characteristic into account in order to undo what has been done. This form of relief is a common feature of laws seeking to eliminate discrimination, whether the restriction imposed be absolute or not.[58]

Similarly, the federal government under implementing powers granted by the Equal Rights Amendment, and the states under their general police powers, could enact legislation dealing with the various economic and social conditions that underlie and support the present system of inequality.[59] In addition, functional classifications in which members of one sex predominate but which include members of the other sex who are similarly disadvantaged can legitimately be used to support a system of equal rights.

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[57] Generally on the validity of benign classifications to secure greater equality in race relations, see Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 Harv. L. Rev. 564 (1965); Kaplan, *Equal Justice in An Unequal World: Equality for the Negro—The Problem of Equal Treatment*, 61 Nw. U.L. Rev. 363 (1966); *Developments—Equal Protection*, *supra* note 15, at 1105-20.

[58] With respect to the power to afford affirmative relief in framing judicial remedies, see Swann v. Charlotte-Mecklenburg Board of Education, 91 S. Ct. 1267 (1971).

The precise form these measures would take cannot be delineated in advance of the event. This is an area in which remedies must be fitted to particular problems as they appear.

F. *State Action*

The Equal Rights Amendment as proposed provides that equality under the law shall not be denied or abridged "by the United States or by any State." Like the Fourteenth and Fifteenth Amendments, therefore, the legal effect of the Amendment is confined to "state action." How does this much-debated and increasingly complex concept apply in the context of women's rights?

Constitutional doctrines pertaining to state action have developed mainly in the area of race discrimination. They are intricate and confusing, but in essence they embody two concepts. One is that the existence of state action depends upon the nature and degree of state involvement. This may range all the way from a direct criminal prohibition of certain conduct to the maintenance of conditions in the society that permit private activity to exist; from direct action to apparent inaction; from de jure to de facto responsibility. The second is that state action depends upon the function being performed. The activity out of which the claim for equal protection arises may range from a clearly governmental operation, such as the election of public officials, to purely personal relationships, such as a private social gathering. Both the "state involvement" and the "public function" concepts lead in the same direction and ultimately to the same conclusion: "state action" takes place in the public sector of society and not in the private sector.[60]

The Supreme Court has not decided whether the "state action" required is the same for all kinds of constitutional rights involved, or even whether it is the same for all kinds of claims made under the Equal Protection Clause. In other words it is not clear whether the same showing of "state action" is necessary to assert a right under the Equal Protection Clause as under due process or freedom of speech guarantees; or whether "state action" is identical in cases alleging discrimination on account of race as discrimination on account of religion, wealth, nationality or politics. In general it may be assumed, however, that while the basic principles for determining state action remain the same, the relevant factors may apply differently in different situations.

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[59] On the analogous power of Congressional implementation conferred by the enforcement clause of the Fourteenth Amendment, see Katzenbach v. Morgan, 384 U.S. 641 (1966). See also South Carolina v. Katzenbach, 383 U.S. 301 (1966); United States v. Guest, 383 U.S. 745 (1966); Oregon v. Mitchell, 400 U.S. 112 (1971).

[60] *Cf.* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967).

So far as the Equal Rights Amendment is concerned the problem would be to determine what should be held part of the public sector, in which different treatment on account of sex is forbidden, and what is part of the private sector, in which different treatment is allowed. In some areas the factors relevant to that determination would tend toward a broad application of state action. Thus in the areas of voting (already covered by the Nineteenth Amendment), employment (including the right of representation by the collective bargaining agent), and education, the public character of the function would lead to the requirement that the state assume extensive responsibility. There are other areas where the private sector would extend more broadly and the scope of "state action" would be correspondingly diminished. Such would be the case as to social, recreational and fraternal associations; facilities such as hotels, restaurants and theaters; and the right to dispose of property by will. Here the public effects of sex differentiation are less significant and a wider realm of individual choice is acceptable.

The application of the state action concept under the Equal Rights Amendment has been most widely discussed in connection with the area of education. There is no doubt that the Equal Rights Amendment would eliminate differentiation on account of sex in the public schools and public university systems. The decision of the Supreme Court in *Williams v. McNair*, noted previously,[61] could not stand. The question has been raised, however, as to how the Amendment would affect private schools and universities. The courts have so far consistently ruled that even the large private universities are not within the sphere of state action.[62] The decision of the Supreme Court in

[61] Williams v. McNair, 401 U.S. 951 (1971); see discussion at p. 881 *supra*.

[62] *See* Guillory v. Administrators of Tulane University, 203 F. Supp. 855 (E.D. La.), *vacated*, 207 F. Supp. 554, *aff'd* 306 F.2d 489 (5th Cir. 1962); Greene v. Howard University, 271 F. Supp. 609 (D.D.C. 1967), *remanded*, 412 F.2d 1129 (D.C. Cir. 1969); Grossner v.

Walz v. Tax Commission of the City of New York,[63] upholding tax exemption for religious institutions, indicates that state-conferred tax exemptions alone would not bring private schools and universities into the state action realm. Thus it appears that, in the absence of special factors, under present court decisions on state action private educational institutions would remain within the private sector, not subject to the constitutional requirements of the Equal Rights Amendment.[64]

The current state of the law on state action in the field of education, however, will be subject to further development as the goals of the Equal Rights Amendment are pressed upon the courts. It would seem clear that the basic principles of state action would, as a general proposition, require that the state eliminate male domination from the educational system. What this would demand in specific instances cannot be spelled out in detail at this point. To the degree that large private institutions, functioning in a quasi-public capacity, provide a significant share of the education which counts most heavily toward achievement in our society, they will be required to operate without discrimination against women. The public sector in education would never be construed to embrace all private schools or colleges. Nevertheless, under present conditions, the Equal Rights Amendment will operate to expand the area in which different treatment of the sexes is impermissible in the area of education.

In general, it may be said that the concept of state action would be rigorously applied up to the point necessary to achieve the objectives sought by the Equal Rights Amendment. In the long run, as discrimination against women disappeared, however, it would be desirable for the public sector, in which state action prevailed, to diminish, and the private sector, in which individual preferences were recognized, to expand.

G. *Other Matters of Interpretation and Wording*

Several other questions of interpretation, as to which no serious problems arise, remain to be noted. One is the meaning of the word

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Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968); Powe v. Miles, 294 F. Supp. 1269 (W.D.N.Y.), *modified*, 407 F.2d 73 (2d Cir. 1968).

[63] 397 U.S. 664 (1970).

[64] Of course, significant government aid, financial or otherwise, would involve state action. See, e.g., Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). See also Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970).

"rights" as used in the Amendment. The proponents have always made it clear that the exercise of rights entails the performance of duties and that the term "rights" includes all forms of privileges, immunities, benefits and responsibilities of citizens. By 1971, even the Amendment's opponents grant this, abandoning Senator Hayden's distinctions.

Consensus has also been reached on the meaning of the enforcement clause of the Amendment. In 1943, the Senate Judiciary Committee used the language of the Eighteenth Amendment, that "Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation."[65] The committee intended that this provision be construed as limiting Congressional authority in implementing the Amendment to that already provided by some existing federal constitutional power. Such is not, however, the intention of the present proponents. And the ambiguity has been clarified in the resolution introduced in this session by Representative Griffiths.[66] The enforcement provision is now similar to that in the Thirteenth, Fourteenth, and Fifteenth Amendments, and reads: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[67] The states, not operating under a system of delegated powers, need no further grant of authority to implement the provisions of the Amendment.

There remains the question whether the present wording of the substantive provisions of the Amendment, which has been stable since 1943, can be clarified or improved. There is no persuasive reason to make any change. In the first place, the present language states the central idea succinctly. Its wording is similar to other constitutional amendments establishing and protecting fundamental rights, notably the Fourteenth, Fifteenth, and Nineteenth. Like them, the Equal Rights Amendment states a general principle rather than spelling out the concept of equal rights in detail. This permits development of more specific doctrines through constitutional litigation and adaptation of the basic mandate to unforeseen situations and new conditions, a process which has proved generally successful throughout our history.

Second, a search for more appropriate wording in the constitutions of other countries has not yielded positive results. Provisions granting equal rights for women do occasionally exist. Thus, Article 3, Section 2 of the Constitution of the German Federal Republic provides: "Men and women are equal before the law." This formulation, however, does not seem preferable to the Equal Rights Amendment.

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[65] S. Rep. No. 267, 78th Cong., 1st Sess. at 1 (1943).

[66] H.R.J. Res. 208, 92d Cong., 1st Sess. (1971). Many resolutions embodying the Equal Rights Amendment have been introduced in the House of Representatives in the 92d Congress. They vary in their provisions on ratification, effective date, and enforcement. However, the version proposed by Representative Griffiths is the one which has received the endorsement of most of the proponents of the Amendment.

[67] H.R.J. Res. 208, 92d Cong., 1st Sess. § 2 (1971).

Finally, use of this wording does not bind proponents to older, unacceptable theories sometimes advanced in previous debates. On the contrary, the responsibility rests upon the present Congress to attach to the Amendment the meaning it now intends.

H. *Summary*

We believe that the Equal Rights Amendment, broadly construed in the manner set forth above, furnishes a viable structure for achieving equality of rights for women. The basic proposition—that differences in treatment under the law shall not be based on the quality of being male or female, but upon the characteristics and abilities of the individual person that are relevant to the differentiation—is founded in the fundamental values of our society. Most of the objections which have been addressed to the absolute form of the Amendment are answered by the fact that the Amendment is inapplicable to laws dealing with unique physical characteristics of one sex or by application of the constitutional right of privacy. Such other objections as have been advanced simply run counter to the major premises upon which the concept of equal rights for women stands. Furthermore, they must fall before the intransigent fact that no system of equal rights for women can be effective which attempts to litigate in each case the judgment whether the differentiation is "reasonable" or "justified" or "compelled." As a matter of constitutional mechanics, therefore, the law must start from the proposition that all differentiation is prohibited.

IV. Problems of Transition

The Equal Rights Amendment provides for a two-year period after ratification before it goes into effect. This time will give the states and the federal government an opportunity to conform their laws to the mandate of the Amendment. Some opponents of the Amendment claim that this attempt to revise laws and practices will prove hopelessly confusing and difficult. Undoubtedly the transitional problems are important and will entail the expenditure of much thought and energy. But they are often far overstated. Technically, reviewing state laws to discover those which violate sex equality and reformulating them to satisfy the Equal Rights Amendment is easily within the competence of our legislative and judicial institutions. This task ought, however, to be entrusted wherever possible to persons who are sensitive to the existence of sex discrimination and who are fully committed to extirpating it wherever it appears.

A. *Legislative Revision*

Given a desire to comply with the Amendment, legislative revision of existing laws is quite feasible. In the first place, legislatures will have received a broad national mandate from the Congress, and will have begun to discuss these issues when ratifying the Amendment. Momentum and guidance normally unavailable to them will be provided by the simultaneous action of many states on the same project. Calling upon the legislatures to make changes in such an atmosphere will be far different from relying on them, without an Amendment, to revise all their laws. Moreover, broad changes in important and complex areas of legislation have been successfully carried out under such circumstances in the past. When the Social Security Act[68] was passed in August, 1935, every state found it necessary to enact an unemployment compensation statute—a form of legislation with which we had had no experience whatever in this country—and to establish a complex system of administration. Yet all this was substantially accomplished in less than eighteen months. Many states have revised their commercial laws and adapted the Uniform Commercial Code to fit their needs. Connecticut and Illinois recently recognized the need for change in their criminal laws and enacted new penal codes.[69] These revisions of large bodies of legislation (and related judicial precedent) have been effected without causing widespread uncertainty or confusion.

Second, the amount of work involved is limited by the fact that the Equal Rights Amendment affects only state action. Furthermore, some of the changes in official policy will be accomplished by administrative agencies, most of which have full power to conform their practices to the Amendment, by regulation or otherwise, without going to the legislature for new authorization.

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[68] Ch. 531, 49 Stat. 620 (codified in scattered sections of 42 U.S.C.).

[69] CONN. GEN. STAT. ANN. PENAL CODE, 1969 Public Act No. 828 (effective Oct. 1, 1971); Criminal Code of 1961, ILL. ANN. STAT. ch. 38, §§ 1-99 (Smith-Hurd 1964).

The procedures for accomplishing law revision vary throughout the country, according to the institutions and practices of the different states. Most states, however, have some official body, often a committee of the legislature, called the Law Reform Commission or the Legislative Council, which oversees statutory change. These commissions normally operate between sessions of the legislature and are the traditional instrument for reforming state law. They would normally be expected to be involved in the changes required by the Equal Rights Amendment.

In implementing the Equal Rights Amendment, however, it is particularly important that the group primarily responsible for the work include the Amendment's principal constituency, the women of the state. Two factors should thus be taken into account by governors in appointing a group to manage the review. One is the need for legal talent and familiarity with the areas of law requiring change. The other is the necessity that the group be responsive to women from all sectors of the community, for they are the ones whose needs and preferences are paramount in the revision process. This is not to suggest that these two components will be completely distinct in composition and role. Many of the lawyers involved ought to be women, and the representatives of community groups will aid in all aspects of the project.

In creating their commissions, the states can draw on a wide range of institutional resources. The state university law school, equipped to do research and drafting, will probably be the institution most often consulted and chosen to oversee the task. In some states, the Commission on the Status of Women would be an appropriate starting point. Such commissions, with women members, exist in every state, and an Interstate Association keeps the groups in contact. The State Association of Women Lawyers, the National Conference of Law Women, and the State Bar Association are other sources of legal skills. Likewise, groups such as the American Civil Liberties Union, Women's Equity Action League, and the National Organization of Women could provide advice and research in many states.[70]

The group given main responsibility for the legal study should include women from community groups such as the local chapter of the National Welfare Rights Organization, the League of Women Voters, women in union locals, and the state Democratic and Republican women's clubs. As members or close consultants to the working body, these women would take part in policy decisions regarding the new laws. They would also serve as conduits for the opinions and ideas of other women in the state.

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[70] This list of groups and organizations is of course only suggestive. As the women's movement continues to burgeon, more and more organizations are gaining experience for the task of law reform through lobbying and litigating for women's rights under present laws.

On a national scale, several groups might offer aid to the states in their work. The Citizens' Advisory Council on the Status of Women, created by Executive Order in 1963,[71] has done much work on the Equal Rights Amendment. Its research would be a source of ideas and information for the state groups on the form and substance of new legislation. The Council of State Governments, mainly an information-sharing association, could also prove helpful by circulating data about action which the various states are taking to bring their laws into compliance with the Amendment. The National Conference of Commissioners on Uniform State Laws could draft uniform laws in some of the areas in which major change will have to be made. Their Uniform Marriage and Divorce Law, for example, already follows the principles of the Equal Rights Amendment, and many states might want to adopt that law instead of doing their own rewriting.

As the Uniform Marriage and Divorce Law shows, the task of revising state laws and practices is not one which must be undertaken as a totally new and fresh project. Much work has already been done. The Model Penal Code goes a long way toward removing sex discrimination from the criminal law. In virtually every legal area affected by the Amendment there has been some experience, some thinking, or some work in progress. The job that remains is to mould and complete the materials already partially created to suit the needs of the particular states.

Even after such good faith efforts have been made (or in cases of failure to complete the revision), there remain other problems of transition. The new legislation, or old law in areas in which the legislature did not act, will inevitably raise questions of construction and application. These matters the courts will be called upon to resolve.

B. *The General Rules for Judicial Application of the Equal Rights Amendment*

To the extent that Congress and the state legislatures have expressly indicated the impact the Equal Rights Amendment is meant to have on existing law, that legislative history will govern later judicial interpretation. However, in many instances there may be no clear legislative mandate available, and the courts will have to determine the impact of the Amendment in light of its general legislative history and settled principles of constitutional adjudication. The doctrines developed by the courts for this task have given them broad authority to make sensible and practical adjustments in conforming current laws to the requirements of the constitutional mandate. Thus, the courts have the power to construe legislation to avoid unconstitutionality or even to avoid constitutional doubts; they may hold certain sections or applications of a law to be separable from others in order to save parts of the law; they may extend the scope of a statute to reach those wrongfully excluded; or they may invalidate the law *in toto.* The considerations governing the use of these various methods of construction have not always been made explicit in judicial opinions. Nevertheless patterns emerge from an examination of the cases, and it is possible to predict with considerable accuracy what the courts will do in most situations.[72]

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[71] Exec. Order No. 11126, 3 C.F.R. 791 (1963 Comp.).

In cases challenging statutes under the Equal Rights Amendment the courts will be faced with essentially two alternatives: either to invalidate the statute or to equalize its application to the two sexes. If the latter alternative is selected, there may sometimes be a question as to the proper basis for equalization. However, the more difficult problems posed in the application of other constitutional doctrines, such as vagueness or chilling effect, are unlikely to arise here.[73]

In determining the impact of a constitutional provision upon a non-conforming statute, courts look primarily to the legislative intent behind the statute in question. Whether the statute falls completely or is modified in some way depends upon the court's assessment of what the legislature itself would have done had it known that all or part of its original enactment would be invalid. Of course, such legislative intent is often not easily ascertained. Where legislative history is scant, or lacking altogether, there is little for courts to rely on except their own judgment about what the legislature must have intended. Then, too, the further question arises as to which legislature's intent is relevant—the one which passed the bill originally, an amending legislature, if any, or the one currently in session.[74]

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[72] For more detailed discussion of problems of statutory construction when constitutional questions are involved, *see* J. SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. F. Horack ed. 1943) [hereinafter cited as SUTHERLAND]; Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962); Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76 (1937) [hereinafter cited as Stern]; Note, *Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions*, 53 COLUM. L. REV. 633 (1953); Note, *The Effect of an Unconstitutional Exception Clause on the Remainder of a Statute*, 55 HARV. L. REV. 1030 (1942).

[73] For reasons why vagueness and chilling effect problems are unlikely to arise, *see* notes 78 & 85 *infra*.

In these circumstances, critics have charged that legislative intent and the policy judgment of the reviewing court are nearly indistinguishable. However that may be, the courts have tended to structure their judgment in terms of certain standard factors which are thought to provide at least rough guides to probable legislative intent and, equally important, to rational results in adjusting statutes to constitutional requirements. Since several of these factors are often present in one case, it is useful to describe the factors briefly and then, by way of illustrating their operation, analyze selected cases.

The first of these interpretive factors is a practical consideration of the *importance* of the legislation and the *feasibility* of retaining it in the altered form required by the constitutional mandate. If the challenged statute deals with a subject of major significance, the court will attempt to find a saving construction, even if that requires a strained interpretation of the statutory language on its face. On the other hand, if the saving construction produces a result which is not workable as a practical matter, or requires drastic changes in other areas to be viable, the court will be inclined to strike down the statute. For example, a court would be most unwilling to invalidate a revenue law or a voting qualifications statute, because taxes and voting are crucial to the political system. However, it might refuse to extend a law prohibiting night work for women to cover men, because such extension of coverage would not be feasible without fundamental changes in industrial organization, and because the subject matter is one that could readily await legislative action.[75]

Second, the courts are influenced by the *proportional difference* between what the original enactment was designed to cover relative to how much it can or must constitutionally include. This factor may be reflected either in terms of the number of persons who would be added or excluded relative to the original number, changes in geographical area covered, the number of original provisions which remain, or other indices of the percentage of the statute added or subtracted. Thus if the class added by construction is small in comparison with the classes already included, the court will generally assume that the legislature would prefer the statute to stand despite a minor change and will probably extend the law to conform with the new constitutional mandate. If the proportion is reversed, the court might, by invalidating the law, refer the matter back to the legislature for decision.[76]

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[74] For the maxim that, assuming any legal effect can be given to the remaining provisions of the statute, legislative intent is determinative, *see* Dorchy v. Kansas, 264 U.S. 286, 289-90 (1924). *See also* Note, *supra* note 72, 53 Colum. L. Rev. at 642. For the proposition that the amending legislature's intent may be relevant, *see* Note, *supra* note 72, 55 Harv. L. Rev. at 1033.

[75] *See* Note, *supra* note 72, 55 Harv. L. Rev. at 1032 n.20, 1033 nn.21 & 22, citing cases concerning tax statutes from which exceptions were removed, *e.g.*, State *ex rel.* Bolens v. Frear, 148 Wis. 456, 134 N.W. 673 (1912), *appeal dismissed*, 231 U.S. 616 (1914); State *ex rel.* v. Baker, 55 Ohio St. 1, 44 N.E. 516 (1896), demonstrating the importance of when the legislature will be able to meet and enact a new statute; State *ex rel.* Wilmot v. Buckley, 60 Ohio St. 273, 54 N.E. 272 (1899); Anderson v. Wood, 152 S.W.2d 1065 (Tex. 1941), indicating the significance of an existing law of similar substance. McLaughlin v. Florida, 379 U.S. 184, 195-96 (1965), also deals with this latter issue.

A third factor which strongly influences the courts is whether the statute in question is *civil* or *criminal*. Courts have long observed a maxim that penal laws are to be strictly construed. To avoid judicial creation of new crimes beyond those established by the legislature, courts will refuse to extend a criminal law to cover groups of people implicitly or explicitly excluded on the face of the law. In other words, the courts will not presume that the legislature, faced with the problem of unconstitutionally under-inclusive penalties, would have chosen to extend them to a new group.[77] As one court put it, in the process of invalidating an entire penal statute:

> By striking out the exemption as unconstitutional, it leaves subject to criminal prosecution those the Legislature expressly intended should be exempt.
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> As to them it would be making that a crime which was never intended should be. The exemption renders it impossible to enforce the legislative will.[78]

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[76] *See* Note, *supra* note 72, 55 HARV. L. REV. at 1030 n.3, citing 22 CALIF. L. REV. 228 (1934), and 1030 n.6, 1031 n.7 and cases cited therein. State statutes which exclude non-citizens from benefits are usually interpreted to extend benefits to them, while statutes which impose burdens on them are almost invariably struck down, to avoid unconstitutionality under the Privileges and Immunities Clause of Article IV § 2. The fact that the number of non-citizens burdened by a statute or excluded from a benefit-conferring act is usually small in proportion to the number of citizens may account for these results, although this is not stated explicitly in the cases. *See* Note, *supra* note 72, 55 HARV. L. REV. at 1034 n.40, 1035 nn.41-44; Quong Ham Wah Co. v. Industrial Accident Commission, 184 Cal. 26, 192 Pac. 1021 (1920), *appeal dismissed* 225 U.S. 445 (1921) (workman's compensation benefit privilege extended to nonresidents).

[77] *See* for discussion and authorities, 3 SUTHERLAND, Ch. 56, esp. §§ 5604-5606, at 44-47; 2 SUTHERLAND § 2418, at 196-97; *cf.* Stern, *supra* note 72, at 88 nn.56-58, 89 nn.59-61; Note, *supra* 72, 55 HARV. L. REV. 1030, 1031, n.11; Yu Cong Eng v. Trinidad, 271 U.S. 500, 515-23 (1926) (citing cases). *Contra*, McCreary v. State, 72 Ala. 480 (1883); *cf.* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 543 (1942) (dictum). See discussion at p. 919 *infra*.

[78] State v. Cantz, 124 La. 535, 543, 50 So. 524, 526 (1909). Judicial revision of criminal statutes often raises a problem in addition to the one discussed. If a court,

The three factors discussed so far are the principal ones which guide the courts in determining legislative intent when the legislative history of the statute or the constitutional provision itself does not explicitly resolve the issue. There are two additional considerations which may influence judicial resolution of a constitutional challenge, but they operate with less force and clarity.

The first is related to the criminal-civil distinction. If a saving construction has the effect of extending a *burden* to a previously excepted class, the courts are somewhat less likely to adopt it than if the new construction extends a *benefit* previously denied those excepted. Thus a statute prohibiting women from being bartenders would be stricken down rather than extended to men; but a law giving only mothers of illegitimate children a right to custody would be extended to fathers.[79] There are two kinds of ambiguities, however, in the benefit-burden analysis, both of which may make it difficult for courts to appraise the benefits and burdens involved. First, a law may have a variable impact within the covered classification. Thus, a law providing a lower age of termination of parental support and control for women than men, or a law setting maximum hours for female workers, provides benefits to some of the class covered by the law (those who want to be free of parental supervision and those who do not want to be forced to work long hours) and burdens to others (those who want to be supported through college by their parents and those who want to earn high overtime wages). Second, a law which provides a benefit to one class may entail a cost to another class. Thus, a law providing overtime pay for female employees may be intended to benefit them but also burdens the employer. Where the burden falls on the general public, as in the case of a benefit supported by tax funds, the court may be inclined to ignore the burden or cost aspect of the equation and extend the benefit to improperly excluded classes. But where the burden is borne by private

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to avoid unconstitutional overbreadth, must read specific words of exception into a statute, the statute may be unconstitutionally vague as well. As the Supreme Court stated in Smith v. Cahoon, 284 U.S. 553, 564 (1931):

> Either the statute imposed upon the appellant obligations to which the State had no constitutional authority to subject him, or it failed to define such obligations as the State had the right to impose with the fair degree of certainty which is required of criminal statutes.

This problem is acute where the saving construction of the court, in "discovering" an implicit exception, raises the possibility that there may be other exceptions of a similar nature as yet hidden. Since the Equal Rights Amendment deals with the inclusion or exclusion of either of two well-defined groups, this problem is unlikely to arise.

[79] *See* Note, *supra* note 72, 55 Harv. L. Rev. at 1031-32, 1034-35, and cases cited at 1035 nn.42-44.

individuals or groups the court may react differently.[80] For these reasons the benefit-burden dichotomy will often require further analysis.

The final consideration, which is probably the most frequently mentioned by judges, is actually the least important. In a series of cases dating back at least to *United States v. Reese*[81] in 1875, courts have claimed that they lack the power to add words to statutes, although they possess the power to excise words or to interpret them freely. Several commentators have rightly been critical of this semantic distinction on the ground that the answer to the question of what the legislature would have wanted to happen is not contingent on whether the result requires the addition or removal of words.[82] An examination of the cases in which courts have refused to reach a given result for methodological reasons suggests that alternative bases exist for most of these decisions, including hostility on the part of the court to the substantive policy embodied in the challenged statute.[83] In other words, semantic considerations appear to play more of a role in the courts' description of what they are doing than in the actual results. This factor can therefore be largely ignored as a basis of decision, although it may tip the scales one way or another in an unusually close case.[84]

The factors outlined above do not exhaust all the possibilities. But they do suggest the principal guidelines for judicial determination of "legislative intent." Since these factors sometimes militate against each other in particular cases, judicial interpretation of the Equal Rights Amendment can only be predicted if the relative weights accorded each are taken into account. The way in which these considerations operate in the actual process of judicial decision can best be seen from a brief examination of cases in areas most comparable to the Equal Rights Amendment.[85]

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[80] *See, e.g.*, Burrow v. Kapfhammer, 284 Ky. 753, 145 S.W.2d 1067 (1940), noted at 54 HARV. L. REV. 1078 (1941). *But cf.* Butte Miners' Union No. 1 v. Anaconda Copper Mining Co., 112 Mont. 418, 118 P.2d 148 (1941), noted at 55 HARV. L. REV. 1052 (1942).

[81] 92 U.S. 214 (1875).

[82] *See, e.g.*, Stern, *supra* note 72, at 94-97.

[83] *See* the discussion in *id.*, at 102. Cases reflecting hostility on the part of the Court to the substantive policy involved in the statute include Carter v. Carter Coal Co., 298 U.S. 238 (1936) and United States v. Reese, 92 U.S. 214 (1875), discussed in Stern, *supra* note 72, at 99. An example of a different "alternative basis" is Illinois Cent. R.R. v. McKendree, 203 U.S. 514 (1906), where the Court cast its decision in methodological terms perhaps to avoid reaching another constitutional issue on which it was divided. See Stern, *supra* note 72, at 102 n. 116.

[84] One indication of the accuracy of this analysis is the frequency with which the same courts follow the rule against addition of words on some occasions and violate it on others, avoiding open conflict with the *Reese* line of cases by neglecting to discuss the methodology implicit in their result. *See, e.g.*, Holy Trinity Church v. United States, 143 U.S. 457 (1892), and Stern, *supra* note 72, at 80-82, 96.

In several cases arising under the Fifteenth Amendment, state voting statutes which discriminated on their face against blacks were automatically extended to cover blacks as well as whites.[86] In those cases, the number added by the court was small in proportion to the number of people already included; in addition voting statutes are of prime importance to the operation of government and the inclusion of the new group did not raise administrative problems. Under the Nineteenth Amendment, prohibiting denial of the right to vote on account of sex, the same result was reached even though a large number of new voters (potentially over 50 per cent) was added to the rolls.[87] In these cases the subject matter—voting—was clearly the dominant factor. Courts are unwilling to invalidate such laws, thereby leaving the state without a statute on voting qualifications and procedures. Even when the number added by the change is large in comparison to the number covered by the original enactment, the importance of the law requires extension rather than invalidation.

The equal protection decisions probably provide the closest analogies to the cases likely to arise under the Equal Rights Amendment. Dealing with discrimination against specified classes of individuals, they have usually resulted in the extension of benefits to the previously excluded group. For example, in *Sweatt v. Painter*[88] and *McLaurin v. Oklahoma State Regents*[89] the right of access and treatment substantially identical to that accorded white students in state institutions of higher education was extended to black students. Such extension of benefits has not been limited to cases involving racial discrimination.

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[85] In this survey we do not discuss statutes challenged on First Amendment grounds. Where statutory language has been found to be overinclusive on First Amendment grounds, a court will ordinarily refuse to limit the enactment to its constitutional applications in order to preserve the statute. The explanation is that a limiting construction will not eliminate the vice of the statute, which is that the over-broad language on its face will chill the exercise of protected First Amendment freedoms. Analogous Equal Rights Amendment cases are unlikely to arise, for it is the direct rather than the chilling effect of statutes which will be called into question. Similarly, we will not discuss challenges on grounds of vagueness, since the extension required in Equal Rights cases is likely to involve well-defined groups.

[86] Neal v. Delaware, 103 U.S. 370 (1880); *Ex parte* Yarborough, 110 U.S. 651 (1884); Guinn v. United States, 238 U.S. 347 (1915); Myers v. Anderson, 238 U.S. 368 (1915).

[87] *See* Leser v. Garnett, 258 U.S. 130, 136 (1922); Breedlove v. Suttles, 302 U.S. 277, 283 (1937); Graves v. Eubank, 205 Ala. 174, 87 So. 587 (1921); Foster v. Mayor & Council of College Park, 155 Geo. 174, 117 S.E. 84 (1923); Matter of Cavellier, 159 Misc. 212, 215, 287 N.Y.S. 739, 742 (1936).

[88] 339 U.S. 629 (1950).

[89] 339 U.S. 637 (1950).

In *Levy v. Louisiana*[90] the right to recover wrongful death benefits was extended to illegitimate children, and in *Shapiro v. Thompson*[91] the right to receive welfare benefits was extended to cover residents who had recently moved from another state. Extension in these cases was consistent with the general principles of construction discussed above: the statutes were civil, their subject matter was important, and the number of people added to the coverage of the law was small in comparison to the number already included. But even when the number of people affected is large, a statute involving an important civil benefit or duty is often extended. In *White v. Crook*,[92] the Alabama statute excluding women from jury duty was held to violate the Fourteenth Amendment; it was not struck down, but instead the right and duty of serving was extended to women.

On the other hand, when the discrimination is part of a criminal law, the coverage of the law is rarely if ever extended.[93] Thus, a criminal law providing special penalties for interracial cohabitation was struck down rather than extended to all cohabitation in *McLaughlin v. Florida*.[94] And the courts have invalidated state laws providing greater criminal penalties for women than for men, rather than extending the increased penalties to men.[95] Since persons prosecuted under a law are unlikely to urge that the law be extended to cover those discriminatorily excluded, and since individuals not prosecuted cannot urge this result, it might seem that the alternative of extension is not even before the court. However, in *Skinner v. Oklahoma*, a law which arbitrarily selected one class of habitual offenders for sterilization was remanded to the Oklahoma Supreme Court because, as Justice Douglas said,

> It is by no means clear whether, if an excision were made, this particular constitutional difficulty might be solved by extending on the one hand or contracting on the other . . . the class of criminals who might be sterilized.[96]

Apparently, the Oklahoma Supreme Court did not feel it could take upon itself the decision to extend the penalty to a class of offenders not included by the legislature, and therefore invalidated the law by failing to take action on remand.

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[90] 391 U.S. 68 (1968).

[91] 394 U.S. 618 (1969).

[92] 251 F. Supp. 401 (M.D. Ala. 1966).

[93] *See* authorities cited in note 77 *supra*.

[94] 379 U.S. 184 (1964).

[95] U.S. *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

[96] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 543 (1942) (citations omitted).

Taken as a whole, the principles used by the courts have operated to produce results that are probably what the legislature would have done had it known of the new constitutional mandate. While no one can say that the outcome of every issue will be the same in every state, it can be said with some assurance that the courts have the powers, doctrines and experience to handle Equal Rights Amendment cases without wholesale invalidation of viable laws or other absurd results. The main problem which we have discovered is the necessity for state legislatures to direct particular attention to their criminal laws, as the courts are least likely to correct defects in this area.

V. The Amendment in Operation

The theory of the Equal Rights Amendment, described above in Part III, will provide a framework for deciding whether laws and governmental practices are constitutional under the Amendment. The criteria for judicial application, discussed in Part IV(B), will function as ground rules guiding judges in implementing a decision that an existing law is unconstitutional. However, for most of those who are deciding whether or not to support the Equal Rights Amendment, it will not be enough to know the general theory underlying the Amendment. They will want to know how the Equal Rights Amendment will affect legal rights and responsibilities in important areas of their lives. They will want to assure themselves that the changes will not produce absurd or chaotic results, and that there will be a reasonable degree of predictability. This is so especially since the debate over the Equal Rights Amendment has been waged largely in terms of its impact on particular laws or institutions.

Many of the important changes which the Equal Rights Amendment will require are easy to predict and will serve to correct instances of clearcut sex discrimination in the law. Some of these changes are mentioned here simply to remind readers that, once the theory of the Equal Rights Amendment has been agreed on, much of its application will be obvious and direct. States with jury laws which make special exceptions or exemptions for women will no longer be able to discriminate on the basis of sex. For example, states which grant jury service exemptions to women with children will either extend the exemption to men with children or abolish the exemption altogether. The few state laws which still require women to comply with special qualifications to do business will be invalidated, as will laws which prohibit women from acting as trustees or executors. Age differentials on the basis of sex will be equalized: the age of majority will be the same for men and for women, and the child labor laws and juvenile court laws will cover young people until the same age, regardless of sex. Similarly, legal retirement ages will be equalized for men and women: where the permissive retirement age is lower for women, the chance to retire early will be extended to men; but where the compulsory retirement age is lower for women, women will be permitted to continue working until the same age as men. Men and women will be considered for admission to all state universities on an equal basis. Government benefit programs which currently discriminate on the basis of sex will be available to men and women alike: manpower training programs will be required to accept young women on an equal basis with young men, and Social Security will be required to provide the relatives of working women with the same benefits it provides to the families of working men. Women will have the same right to sue for loss of a spouse's consortium that men now have.

In the remainder of the article, we explore the operation of the Equal Rights Amendment with respect to four important areas: protective labor legislation, domestic relations law, criminal law, and the military. These areas have been chosen because they appear to have raised the most serious doubts in the minds of some people. Each involves practices or sets of legal relationships which have been based on sex discrimination and sex differentiation for so long that untangling the effects of sex inequality requires more than an instant's consideration. In addition, many of the issues raised in the discussion of these subjects resemble problems that will arise in other areas. Thus, discussion of their resolution suggests the shape of the impact of the Equal Rights Amendment in other contexts.

In discussing the operation of the Equal Rights Amendment, we have not undertaken a comprehensive justification of the Amendment's beneficial effects. Other writers have explored the harms caused by the law's current discrimination and the benefits which will flow from their elimination by the Equal Rights Amendment.[97]

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[97] *See* the materials cited in note 2, *supra*. *See also* B. BOWMAN ET AL., WOMEN AND THE LAW: A COLLECTION OF READING LISTS (April 1, 1971) (available from Box 89, Yale Law School, New Haven, Conn. 06520); L. CISLER, WOMEN: A BIBLIOGRAPHY, (6th ed. 1970) (available from the author, 102 West 80 St., New York, N.Y. 10024), an excellent guide to the fast increasing body of literature on women's social, political and economic

We have not generally repeated the observations of these writers. Rather, we have concentrated on analyzing the legal changes which the Equal Rights Amendment mandates. It may be noted in passing, however, that the authors believe that fears about the socio-economic impact of the Equal Rights Amendment are based upon unrecognized sex bias, sexual stereotypes which do not take account of the actual capacities and circumstances of most men and women, and failure to consider the comprehensive impact of an absolute theory of legal equality.

A. *Protective Labor Legislation*

The impact of the Equal Rights Amendment upon so-called protective labor legislation applicable only to women has been and remains a source of major controversy. In past years many individuals and groups favorable to equal rights for women refused to support the Amendment because of fear that it would deprive working women of important gains achieved only after hard-fought battles in the late nineteenth and early twentieth centuries. Most of the labor groups currently opposing the Amendment invoke the same argument. Within recent years, however, two important developments have put these issues in a very different light. One is the realization that, whatever the original design, under present conditions legislation of this nature has on the whole proved to be more repressive than protective for women. The other is that Title VII of the Civil Rights Act of 1964,[98] which prohibits discrimination in employment on account of sex, has already largely eliminated such legislation or extended its protection to men. State legislative officials themselves, often explicitly in response to Title VII, are hastening this process of change.

While there are many types of labor laws applicable to women only, basically they may be grouped into three broad categories: (1) laws conferring supposed benefits, such as minimum wages, a day of rest, a meal or rest period, and the provision of chairs for rest periods; (2) laws excluding women from certain jobs, such as mining or bartending, or from employment in any job before and after childbirth; and (3) laws restricting women's employment under certain conditions, such as at night, more than a maximum number of hours, or in jobs

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status; and FEMALE STUDIES I (S. Tobias ed. 1970) and FEMALE STUDIES II (F. Howe ed. 1970) (collections of college reading lists available from KNOW, Inc., P.O. Box 10197, Pittsburgh, Pa. 15232).

[98] §§ 701-716, 42 U.S.C. §§ 2000e to 2000e-15 (1964), *as amended*, (Supp. V, 1970).

requiring the lifting of weights above a set limit. The tables on the following pages show the pattern of these laws as of 1968, and significant changes by state governments and federal courts as of April 1971.[99]

Evidence has been accumulating in recent years that these "protective" laws for women actually provide little real protection.[100] The uneven coverage, wide variation among states, proliferation of exceptions for jobs for which coverage seems most appropriate, and outright exclusion of women from many lucrative occupations demonstrate a lack of protective function. The conclusion that the laws serve primarily as an excuse for employers and unions to keep women in lower paying jobs, or out of the labor force altogether, is supported by the increasing number of women's lawsuits challenging these restrictions. Moreover, any sex-based law has an inevitably discriminatory impact, because a large number of women do not fit the female stereotypes on which the laws are predicated.[101] These women are unfairly denied the higher wages and other benefits of traditionally "male" jobs. To the limited extent that the laws do provide bona fide protection, men are discriminatorily denied benefits.

Title VII of the Civil Rights Act of 1964 confirms the judgment that sex is not a desirable basis for employment rights and practices. Title VII provides that it shall be an "unlawful employment practice" for an employer engaged in an industry affecting interstate commerce, who has twenty-five employees or more, to "discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[102] Similar unlawful employment practices by labor unions and employment agencies are also forbidden. The Act establishes the Equal Employment Opportunity Commission (EEOC) as the agency charged with administration of

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[99] Table I is adapted from S. Ross, Sex Discrimination and "Protective" Labor Legislation, printed in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess., pt. 1, at 592, 595-96 (1970). The table is based on data from WOMEN'S BUREAU U.S. DEP'T OF LABOR, SUMMARY OF STATE LABOR LAWS FOR WOMEN (1969). Table II is adapted from a memorandum prepared by Catherine East, Executive Secretary of the Citizens' Advisory Council on the Status of Women, April 16, 1971.

[100] *See generally, Developments—Title VII*, *supra* note 45, at 1186-95.

[101] *See* S. Ross, *supra* note 99, *passim*, and cases cited in notes 106, 109, 126, 127, and 132 *infra*. *See also* the position of the Equal Employment Opportunity Commission (EEOC) on state protective legislation for women embodied in its regulations, 29 C.F.R. § 1604.1(b)(2) (1970), set out at p. 933 *infra*. A contrary analysis appears in Jordan, *Working Women and the Equal Rights Amendment*, TRANS-ACTION, Nov. 1970, at 16.

[102] § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1964).

TABLE I

STATE LABOR LAWS AS OF DECEMBER 1968

Type of Law	*Number Applicable to Women Only*	*Number Applicable to Men and Women*
	A. *State "Benefit" Laws*	
Minimum Wage	7 3 (not in operation)	29; D.C.*; P.R.*; Federal Fair Labor Standards Act
Day of Rest Prescribed	14; D.C.	7; P.R.; also 28 "Sunday blue laws" which achieve the same result.
Meal Period (20 minutes to one hour)	20; D.C.; P.R.	3
Rest Period (10 minutes for each half day of work)	12; P.R.	0
Chairs to be provided	44; D.C.; P.R.	1
	B. *State Exclusionary Laws*	
Occupations (total exclusion from)	26—including: 17-Work in or about mines 10-Bartending 1-Work in retail liquor stores 11-Other occupations	0
Childbirth (employment before and after prohibited)	6; P.R.	-
	C. *State Restrictive Laws*	
Weight limits (work requiring lifting more than set amount—ranging from 15 to 50 pounds—is prohibited)	10; P.R.	0
Hour limits (work over the limit—with desirable premium pay rates for overtime—is prohibited)	38; D.C. (3 of the 38 states cover both men and women in some industries; only women in others)	3
Nightwork (either prohibited or regulated)	18; P.R.	0

* D.C.—District of Columbia; P.R.—Puerto Rico.

TABLE II

SIGNIFICANT CHANGES IN STATE PROTECTIVE LAWS SINCE 1966

A. *Changes by State Legislatures and State Officials*

Repealed hours laws

Arizona
Delaware
Montana
Nebraska
New Jersey
New York
Oregon
Vermont

Extended weighlifting law to men

Georgia

Rulings by Attorneys General that state laws are superseded by Title VII or state Fair Employment Laws

District of Columbia
Illinois
Kansas (by Commissioner of Labor)
Massachusetts
Michigan
Oklahoma
Pennsylvania
Rhode Island
South Dakota
Washington
Wisconsin

Exemption from hours laws of those covered by Fair Labor Standards Act or comparable standards

California*
Kansas
Maryland
North Carolina
Tennessee
Virginia

Exemption from hours law if employee voluntarily agrees

New Mexico

No prosecutions now because of uncertainty as to effects of Title VII

North Dakota

B. *Changes by Court Decisions*

Hours Laws (cases cited note 132 *infra.*)

California
Illinois
Massachusetts
Missouri
Ohio
Pennsylvania

Weight Laws (cases cited note 127 *infra.*)

California
Ohio
Oregon

* Exemption only partial.

these provisions. Remedy for violation is through conciliation by the Commission or, that failing, court action.[108]

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[108] *See* § 703(b), 42 U.S.C. § 2000e-2(b) (employment agencies); § 703(c), 42 U.S.C. § 2000e-2(c) (labor organizations); § 705(a), 42 U.S.C. § 2000e-4(a) (creation of the EEOC); §§ 706(a)–(k), 42 U.S.C. §§ 2000e-5(a)–(k) (procedures for preventing and remedying violations).

The task of interpreting the prohibitions upon sex discrimination embodied in Title VII has not yet been completed by the courts. The statute's basic proscription against sex discrimination is absolute on its face. The statute does, however, include one significant qualification: the provisions do not apply "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise."[104]

The precise meaning of "bona fide occupational qualification," or bfoq, has not yet been determined. The EEOC has adopted a narrow construction, saying that preference in employment to one sex is permissible only "[w]here it is necessary for the purpose of authenticity or genuineness," as in the case of actors or actresses.[105] The federal courts have recently tended toward equally strict interpretations, although often framing somewhat different tests than the EEOC.[106] Whatever the eventual interpretation of Title VII, however, the significant point here is the powerful impact Title VII has had on state protective labor legislation. Employers otherwise bound to comply with state legislation embodying different treatment for women than for men are now required to conform to the overriding federal legislation which forbids any discrimination on grounds of sex. Although the reasoning used to strike down state legislation under Title VII differs considerably from the Equal Rights Amendment standard of allowing differentiation only on the basis of unique physical characteristics of one sex or the other, the bfoq test, as narrowly construed, is much like the Equal Rights Amendment in practical effect.[107] The consequence is that Title VII gives us a preview of the manner in which the Equal Rights Amendment would displace concepts of "protective" legislation with principles of equal rights. In this area, indeed, the transition is already far along. Therefore, we now turn to a closer examination of laws and cases under the three categories of state protective legislation set out in Table I.

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[104] § 703(e), 42 U.S.C. § 2000e-2(e) (1964).

[105] 29 C.F.R. § 1604.1(a)(2) (1970).

[106] *See, e.g.*, Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), *reversing in pertinent part* 277 F. Supp. 117 (S.D. Ga. 1967), in which the Fifth Circuit ruled that a company regulation imposing a weightlifting limit of 30 pounds only on women was not a bfoq under Title VII. The court defined the standard for allowing sex-based regulations under the bfoq exception as: "an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." 408 F.2d at 235. *But see also* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), *rev'g* 411 F.2d 1 (5th Cir. 1968), in which the Supreme Court implied, without deciding, that the bfoq exception might be considerably broader.

[107] Both Title VII and the Equal Rights Amendment operate to invalidate discriminatory state laws. However, when extension rather than invalidation is involved, they operate in somewhat different ways. Title VII affects state laws only indirectly, as a consequence of its regulation of discrimination in private employment. Therefore, when a court attempts to reconcile Title VII with state law by extending the regulation in question to cover the improperly excepted group, the state law is not actually revised; instead, an additional federal duty is imposed on covered employers. The Equal Rights Amendment, in contrast, would operate directly on state law, and changes, whether invalidation or extension, would apply to all subsequent cases. However, the Equal Rights Amendment

1. *Laws Conferring Benefits*

Even laws providing benefits such as a minimum wage and a required rest period have operated to discriminate against either women or men, and sometimes both. Men are discriminated against whenever they are denied the benefits of such laws. Women are sometimes discriminated against when, for example, they are put on a schedule which includes the required rest periods, while men are not; this arrangement is then used to justify paying women less and limiting them to certain jobs.[108] These discriminations would no longer be possible, of course, if both men and women workers were covered by the benefit-conferring laws.

Title VII cases which have considered such laws have held that the employer could conform to both the state requirements and Title VII by extending the benefits to workers of both sexes.[109] Hence invalidation of the state law has been unnecessary. Where Title VII has not already operated, the courts would probably reach a similar result under the Equal Rights Amendment. Most of the laws which confer benefits may be extended to more workers with little extra burden on the employer, and with little disruption of industrial organization.[110] The courts are therefore likely to presume that the legisla-

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will not otherwise affect discrimination in private employment, unless Congress chooses to enact affirmative legislation under the Amendment's enforcement clause.

[108] *See* S. Ross, *supra* note 99, at 595; Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969), where one of the grounds relied on by the employer to deny a particular job to women was a union contract requiring two ten-minute rest periods for women.

[109] *See, e.g.*, Potlatch Forests Inc. v. Hays, 318 F. Supp. 1368 (E.D. Ark. 1970) (state overtime wage requirement extended to men). *But cf.* Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971).

[110] *See Developments—Title VII*, *supra* note 45, at 1189. The heaviest economic burden to employers might arguably be caused by the extension of state minimum wage and overtime premium pay coverage to men. However, even the economic cost of this extension is likely to be small. First, it is unusual for men to be paid less than women within a particular establishment or occupation, both because men tend to have higher status or more skilled jobs, and because men are often paid more for the same work. *See, e.g.*, WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS, Tables 66, 74, at 150-61 [hereinafter cited as 1969 HANDBOOK]. The extent of wage discrimination against women is indicated by the enforcement and litigation experience under the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1964), which prohibits wage

tures would prefer to have these laws remain in effect, on an equalized basis, rather than be completely invalidated.

2. *Exclusionary Laws*

Laws which exclude women from certain occupations or from all employment under certain circumstances are always discriminatory rather than beneficial and neither could nor should be extended to men. Exclusionary statutes, when carefully scrutinized, provide the best examples of two kinds of laws: those whose only apparent purpose is to protect men's jobs, and those which seem to assume not only that women are too weak to protect their own interests but also that they are too stupid or careless to do so. These laws, which are gradually being struck down under Title VII and would also be expected to fall under the Equal Rights Amendment, are discussed below under two classifications: occupational exclusions and compulsory maternity leave regulations.

a. *Occupational Exclusions.* Laws which exclude women from specified occupations—and, in some states, a bewildering variety of occupations are included—impose a burden on some women without helping any others. Presumably women who do not want to be bartenders or miners will not apply for such jobs, while women who do want to work in the covered occupations, some of which are highly remunerative, are excluded merely because of their sex. Courts have recently begun to invalidate laws of this kind on the grounds of conflict with Title VII and the Fourteeth Amendment.[111] Extension

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differentials between workers of opposite sexes holding jobs of equal skill, effort, and responsibility under similar conditions. Since the Equal Pay Act went into effect in 1964, approximately 50,000 employees, mainly women, have recovered $17 million in back wages. *See* 1 BNA MANPOWER INF. SERV. CURRENT REPORTS, no. 18, May 20, 1970, at 7; *cf.* THE PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, REPORT: A MATTER OF SIMPLE JUSTICE 10 (1970). Second, by 1969, nearly four out of every five nonsupervisory workers in private employment were covered by the federal Fair Labor Standards Act, which, under the relevant 1966 amendments, requires a minimum hourly wage of $1.60 and time and a half for all hours in excess of forty hours a week in most covered occupations. 1969 HANDBOOK at 254; see 29 U.S.C. §§ 203, 206-07 (Supp. V, 1970), *amending* 29 U.S.C. §§ 203, 206-07 (1964). Third, only ten states of forty-one with minimum wage laws limited coverage to women or to women and minors, and only five of the eighteen jurisdictions which provide premium pay rates for overtime limit their coverage to women or to women and minors. 1969 HANDBOOK at 266-67.

[111] The only cases thus far reported have concerned laws excluding women from bartending jobs, sometimes with exceptions for female liquor licensees or close female relatives of the licensee. *See, e.g.*, McCrimmon v. Daley, 2 FEP CASES 971 (N.D. Ill. Mar. 31, 1970), *on remand from* 418 F.2d 366 (7th Cir. 1969) (invalidating a Chicago municipal ordinance under Title VII and the Fourteenth Amendment Due Process Clause); Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne, 57 N.J. 180, 270 A.2d 628 (1970) (invalidating a municipal ordinance as an unnecessary and unreasonable exercise of police power, and criticizing, *inter alia*, Goesaert v. Cleary, 335 U.S. 464 (1948)); Sail'er Inn, Inc. v. Kirby, — Cal. 3d —, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (in-

to men would mean the elimination of certain occupations altogether, and thus it would not be a feasible outcome. Furthermore, it is difficult to imagine an occupational hazard which is based on a physical characteristic unique to one sex; if the occupation is dangerous, it is dangerous to both sexes. Under the Equal Rights Amendment, courts are thus not likely to find any justification for the continuance of laws which exclude women from certain occupations. Legislatures which are concerned with real hazards in certain jobs will have to enact sex-neutral protections.

b. *Compulsory Maternity Leave Regulations.* Laws which require employers to impose leave on pregnant employees for a specified period before and after childbirth, without providing job security or retention of accrued benefits, such as seniority credits, are similarly exclusionary. Seven jurisdictions have enacted such restrictions into law; the stage of pregnancy at which mandatory leave is imposed varies between three weeks to four months before expected delivery.[112] None of these laws provides for any compensation by either state or employer, or job security, during the compulsory leave period, except that of Puerto Rico, which requires the employer to pay one-half salary during leave for temporary disabilities, including eight weeks compulsory leave for pregnancy, and provides job security during the required absence.[113] In addition to state laws, many state agencies have more restrictive regulations for their own employees; school board regulations are particularly significant, since a large number

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validating a state law on the grounds that sex is a suspect classification under the Fourteenth Amendment Equal Protection Clause); *contra*, Krauss v. Sacramento Inn, 2 FEP CASES 733 (E.D. Cal. June 15, 1970) (upholding California statute as reasonable under the Twenty-First Amendment, despite passage of Title VII, and citing, *inter alia*, Goesaert v. Cleary, *supra*).

[112] *See* 1969 HANDBOOK 276-77. The jurisdictions are Connecticut, Massachusetts, Missouri, New York, Vermont, Washington, and Puerto Rico. The statutory prohibition on employment lasts until three to six weeks after childbirth. *Id.* The standard in the state of Washington is established by minimum wage orders, some of which provide that special permission may be granted for continued employment upon employer's request and with a doctor's certificate. In addition, the Oregon Mercantile and Sanitation and Physical Welfare Orders recommend that an employer should not employ a female at any work during the six weeks preceding and the four weeks following the birth of her child, unless recommended by a licensed medical authority. *Id.*

[113] In addition, thirty-seven states and the District of Columbia disqualify women from collecting unemployment insurance during a specified period before and/or after childbirth, whether or not pregnancy is the reason for their unemployment. 1969 HANDBOOK 52-54. Cf. REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES, *supra* note 2, at 25-30, 44-46. On the other hand, Rhode Island's general temporary disability program provides cash benefits for unemployment due to maternity leave for a fourteen-week period around childbirth, and New Jersey's program provides cash payments for disabilities existing during the four weeks before and the four weeks following childbirth. However, New York and California, the only other states with state temporary disability programs, do not include disabilities based on pregnancy except in special circumstances. *Id.* at 44-46.

of women workers teach school. These regulations commonly require leaves to commence much earlier in pregnancy than the state laws discussed above.[114]

Under the Equal Rights Amendment, it will probably be argued in defense of these laws and state regulations that they deal with unique physical characteristics of women. It is true that the state may regulate conditions of employment for women in a physical condition unique to their sex, but the kind of regulation imposed would be subject to careful judicial review, utilizing the kinds of standards set forth previously in Part III.[115] Two recent federal court decisions provide a preview of the kind of close scrutiny which the Equal Rights Amendment will require. One struck down a compulsory maternity leave regulation under Title VII; the other reached the same result under the Equal Protection Clause of the Fourteenth Amendment. Both courts recognized that compulsory maternity leave provisions are not genuinely protective either of women's health or of their employment rights.[116]

In *Schattman v. Texas Employment Commission*,[117] a woman challenged the imposition of compulsory leave in her seventh month of pregnancy. Following the *Weeks* doctrine that Title VII prohibits sex-based employment practices unless the employer can demonstrate a strong factual basis for the policy in terms of safety and efficiency,[118] the court found no such evidence supporting compulsory maternity leave from the plaintiff's desk job.

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[114] *See*, for statistics on women's employment as teachers, 1969 HANDBOOK 90. A survey conducted by the National Education Association showed that in 1965-1966, a large number of school systems required maternity leave to begin between the fourth and sixth month of pregnancy, and extend until three or more months after childbirth. RESEARCH DIV'N, NATIONAL EDUCATION ASSOC., LEAVES OF ABSENCE FOR CLASSROOM TEACHERS 1965-66 20-26 (1967). See also speech by Jacqueline G. Gutwillig, Chairman, Citizens' Advisory Council on the Status of Women, to Conference of Interstate Association of Commissions on Status of Women, St. Louis, Mo., June 19, 1971.

[115] *See* the discussion at p. 895 *supra*.

[116] The legislative purpose of compulsory maternity leave legislation is not entirely clear; the central obscurity is the failure to specify what and who is being "protected," and why the legislature thinks the protection is necessary. Assuming that the primary purpose of such laws is to protect women's health, they can only be rationalized if one accepts as true the proposition that pregnant women, in contradistinction to all other workers, are unable or unwilling to seek or to heed medical advice about the safety and desirability of their continued performance of their jobs in light of the temporary change in their physical condition. Alternative explanations are available, however, and we are not in a position to say which of the possibilities is the actual legislative justification. One can suppose, for example, that the legislature was trying to design genuinely protective legislation and failed to think through fully the operative effect of lengthy compulsory leave without job security either in terms of women's rights as workers or in terms of the relationship between physical health and income and employment rights. Another possibility is that the legislators were willing to sacrifice women's roles as workers, which they considered relatively unimportant, to the supposed demands of pregnancy and motherhood, without much investigation either of medical evidence or alternative legislation with less impact on women's rights as independent adults. Or perhaps male legislators were acting on the basis of Victorian beliefs about the impropriety of women who are "in the family way" appearing in public at all. Since denying pregnant women the right to work when they are medically able and willing to work means that they cannot support themselves, this type of legislation, whatever its ostensible purpose, embodies an unrealistic assumption that all pregnant women have men to support them during their forced confinement.

[117] 3 FEP CASES 311 (W.D. Tex. Mar. 4, 1971), 3 FEP CASES 468 (W.D. Tex. April 16, 1971).

This decision parallels an application of the Equal Rights Amendment's tests for regulations purporting to deal with unique physical characteristics. The maternity leave regulation in the *Schattman* case would satisfy only the most elementary of the unique physical characteristics tests: that the sex-based classification (i.e. pregnant women) be based in fact on a physical characteristic unique to one sex. The regulation would fall, however, if the state could not show the existence of a "problem" of legitimate legislative concern (such as the danger of job-related injuries to pregnant women) and a sufficiently close relationship between the problem and the physical characteristic in question. The state made neither showing in the *Schattman* case; if it *had* demonstrated a job-related problem which was tied to the condition of being seven months pregnant, the court might then have considered whether the regulation imposed was the least drastic solution to the problem demonstrated, and have balanced the importance of the problem against the costs of the least drastic solution.[119]

A similar state regulation was struck down in *Cohen v. Chesterfield County School Board*,[120] in which a female teacher challenged a school board regulation imposing maternity leave at least four months prior to the expected birth of her child. The district court reviewed the supposed medical and administrative reasons for the school board's policy, and found them to have no empirical basis or persuasive force. The argument that mandatory leave was justified by frequent "incapacitation" at that stage of pregnancy was found to be medically incorrect; the idea that pregnant teachers had to be protected from such physical hazards of employment as "pushing with resulting injury to the fetus" was found to be entirely speculative, as was the allegation of increased inefficiency on the job, such as inability to perform duties during fire drills.[121] The court concluded that "[b]asically, the four month requirement . . . was arbitrarily selected," and that "since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working are matters best left up to the woman and her doctor."[122] More broadly, the court held that "pregnancy, though unique to women, is like other medical conditions, and the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the Equal Protection Clause of the Fourteenth Amendment."[123]

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[118] *See* the discussion in note 106, *supra*.

[119] The definition of the "problem," whether by explicit legislative history or by judicial interpretation, is central to setting the standards by which the legislation is to be judged. The more narrowly defined the problem is, the easier it is for the party defending the legislation to prove that the measures the law imposes solve a significant proportion of the problem. On the other hand, a narrow definition might cast doubt on the legislation under other tests, such as the importance of the problem to be solved or the adequacy of measures to select those contributing to the problem from the larger group with the unique physical characteristic. Although the focus of judicial scrutiny would thus shift from one factor to another depending on the definition of the "problem," the burden of proof on those defending the law would remain nearly the same.

[120] 39 U.S.L.W. 2686 (E.D. Va. May 17, 1971). *Contra*, La Fleur v. Cleveland Board of Education, 39 U.S.L.W. 2686 (N.D. Ohio May 12, 1971).

This decision, if cast in terms of the Equal Rights Amendment standards, would be similar to the *Schattman* decision discussed above: the state was unable to make an elementary showing of a job-related problem linked to the physical characteristic at issue. In addition, the court made two other findings that parallel the application of Equal Rights Amendment standards. First, the court held that in its relation to employment, pregnancy was only a small part of the larger problem of temporary disabilities which could not constitutionally be dealt with separately. Second, the imposition of compulsory leave was found to be impermissible where a rule letting a woman and her doctor decide when optional leave should commence would meet any medical need for leave and would be less onerous to pregnant women. In other words, the regulation discriminatorily selected out a small sex-linked part of a larger problem, and imposed a more drastic solution than was necessary. A court operating under the Equal Rights Amendment might also find that a sex-neutral rule, allowing any temporarily disabled worker and his or her doctor to determine the duration and timing of leave, would also be an available less drastic alternative.

3. *Laws Restricting Conditions of Employment*

Other types of laws cannot so easily be categorized as imposing either benefits or burdens on covered workers. In this category are most weightlifting limits, maximum hours laws, and night work prohibitions. As one commentator noted, "the reality is that such laws simply do not accomplish their aim—real protection,"

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[121] 39 U.S.L.W. at 2686.

[122] *Id.*

[123] *Id.* at 2687 (citations omitted).

> [because] sex as a criterion cannot predict with sufficient accuracy who needs what protection. If injury due to lifting weights is a problem the answer is to find out what every *individual* can safely lift with modern techniques and then forbid employers to fire individuals who refuse to lift weights above [their personal] limit. If some men and some women don't want to work overtime and unions want to protect the right not to work overtime, laws should be passed forbidding employers to fire those who refuse overtime, but those men and women who *do* want overtime pay should not be penalized because of the desires of those who do not want it.[124]

The same considerations apply to night work prohibitions. Night work is often better paid and may be more convenient for some women, including those whose husbands could care for the children at this time, or who wanted to work at night while going to school in the daytime. On the other hand some workers, both male and female, would consider it a benefit to be exempted from such assignments.

After an initial period of uncertainty, the EEOC took a strong position in 1969 against labor laws which impose restrictions only on women's employment. EEOC regulations now state:

> The Commission believes that such State laws and regulations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws and regulations conflict with Title VII of the Civil Rights Act of 1964 and will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupation qualification exception.[125]

The courts have also dealt with the impact of Title VII upon laws of this ambiguous kind. While we cannot here analyze all the cases, we select a few typical decisions which illustrate the trends in these areas, and compare the Title VII developments to anticipated results under the Equal Rights Amendment.

a. *Weightlifting*. Several important court decisions on weightlifting have concerned company or union regulations rather than state laws. The principles involved in reviewing these private regulations under

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[124] S. Ross, *supra* note 99, at 597.
[125] 29 C.F.R. § 1604. 1(b)(2) (1970) (issued Aug. 19, 1969).

Title VII, however, are similar to those that would be used in reviewing state legislation under the Equal Rights Amendment. The great majority of decisions, whether dealing with state laws or industry regulations, have either invalidated weightlifting restrictions *in toto* or extended them on an individualized basis to cover both men and women. Since most of the limits are low, between fifteen and forty pounds, it would clearly not be feasible merely to extend the laws as presently written to cover men. If courts reached this result, no factory workers could ever lift even moderately heavy weights, and great changes would be necessary in many plants. Some courts have given employers the option of instituting an individualized testing program, as long as it is applied equally to both sexes.[126]

A more common result in weightlifting cases is complete invalidation, leaving all workers with no protection against employer pressure to engage in the lifting of heavy weights.[127] Under such circumstances the legislature would be free to enact individualized testing requirements, to set higher absolute limits applicable equally to both sexes, or to require employers to provide mechanical aids for the lifting of weights above a certain limit.

Under the Equal Rights Amendment employers, unions and state officials may defend weighlifting regulations for women on the grounds that a unique physical characteristic is involved, just as they argue that sex is a bfoq under Title VII for jobs requiring weightlifting. Although the theories and standards under Title VII cases and regulations differ from the Equal Rights Amendment standards set forth earlier,[128] proponents of weightlifting regulations who have been unable to meet the burden of proof for a bfoq will also probably be unable to satisfy the unique physical characteristics test under the Amendment. If, under Title VII, one cannot prove by factual evidence that "all or substantially all women are unable to perform a given job safely and efficiently,"[129] one almost certainly cannot prove by factual evidence that average weightlifting differences between men and women are caused by a unique physical characteristic possessed by all or some women and no men.[130] There is little reason to doubt, therefore, that courts will invalidate weightlifting regulations for women under the Equal Rights Amendment as well as under Title VII.

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[126] *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), *reversing in pertinent part* 272 F. Supp. 332 (S.D. Ind. 1967).

[127] *See, e.g.*, Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd* — F.2d — (9th Cir. 1971); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Ore. 1969); Local 246, Utility Workers Union v. Southern Cal. Edison Co., 320 F. Supp. 1242 (C.D. Cal. 1970); Ridinger v. General Motors Corp., 39 U.S.L.W. 2548 (S.D. Ohio Mar. 24, 1971) (overturning state laws); Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969) (overturning a company regulation). *Contra*, Godbrandson v. Genuine Parts Co., 297 F. Supp. 134 (D. Minn. 1968) (upholding a company-imposed limit of 40 pounds).

[128] See the general discussion of judicial review under the Equal Rights Amendment of laws based on unique physical characteristics at p. 895 *supra*, and the specific discussion of the *Schattman* and *Cohen* cases at pp. 930-32 *supra*.

b. *Maximum Hours Laws.* Maximum hours laws vary as to the kind and quantity of limits imposed. Some states restrict women workers to a certain number of hours per day as well as per week. These laws are to be distinguished from state laws and union contracts which, while imposing no absolute maximum limit on the number of hours worked in any day or week, do require that all hours worked past a fixed number be compensated at premium rates, usually time and a half or more. A few such premium pay laws cover women only. These are easily extended.

Overtime work at premium pay, guaranteed by state and federal laws or union contracts, is a common feature of many male workers' jobs. Indeed overtime is often necessary for these workers to maintain their standard of living from week to week. Under the maximum hours laws, female workers who wish to work overtime are discriminatorily denied this added source of income. On the other hand, even under premium pay laws and regulations, there are many male and female workers who would prefer to be able to refuse overtime work and still retain their jobs.[131]

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[129] Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

[130] Dr. Rudolph Bono, team physician and surgeon for the New York Giants, was recently quoted as saying,

> Muscle mass for muscle mass, there is *no* physiological difference between males and females. Pound for pound, their muscles can be developed to the same degree of proficiency. Men grow bigger because male hormones increase the size of the body, but the tissues for both sexes are still the same. So if a man and a woman were equal in size, she could develop as well as he could. Most women, of course, don't try for muscular physiques because they don't want to become freaks, so the boys start lifting weights early in life while the girls keep femininity in mind.
>
> In other words, it's a social and emotional limitation that women face in sports, not a physical one. . . . In Russia the athletes don't care about femininity and you should see the muscles on some of those girls.

Schoenstein, *Can You Really Go Play With The Boys?*, SEVENTEEN, June 1971, at 28.

[131] Night work prohibitions, which exist in eighteen states and Puerto Rico, 1969 HANDBOOK 275, have an effect parallel in some respects to maximum hour limitations and in other respects to exclusionary laws. They are like the former when they prevent women from being assigned to certain shifts or jobs during the course of employment and like the latter when they exclude women from certain nighttime occupations altogether. Although it is difficult to see what difference the occupation makes to any supposed legislative justification for these laws, the coverage of only a few occupations is common, e.g. N.Y. LABOR LAW § 173 (McKinney 1965). No cases have yet reached the courts under Title VII. It would be expected, however, that night work laws would be invalidated under either Title VII or the Equal Rights Amendment.

The trend of court decisions under Title VII is to invalidate maximum hours laws which apply only to women.[132] This result would also be predicted from principles of statutory construction under the Equal Rights Amendment. The extension of maximum hours laws to cover men would drastically change many work situations. Individualization by judicial fiat is even more difficult than in the weightlifting cases because there are many alternative ways to protect workers from having to work overtime against their will. Hence, while a law protecting both men and women from coerced overtime is desirable, the courts are likely to leave the matter to legislative decision, meanwhile equalizing both sexes under the Equal Rights Amendment by invalidating the law. This would seem to be one area, therefore, in which legislative attention between ratification and the effective date of the Amendment would be important.

4. *Summary*

The operation of Title VII to date thus foreshadows how, in one important area, the Equal Rights Amendment would function. In general, labor legislation which confers clear benefits upon women would be extended to men. Laws which are plainly exclusionary would be invalidated. Laws which restrict or regulate working conditions would probably be invalidated, leaving the process of general or functional regulation to the legislatures. The courts have already reached these results in a number of cases arising under Title VII. The Equal Rights Amendment would accelerate this trend, providing a new incentive to legislatures and unions to develop and implement programs of genuine protection for workers of both sexes.

B. *Domestic Relations Law*

Given the traditional social and economic view that woman's place was in the home, it is not surprising that laws affecting domestic relations have defined women's rights and duties with great specificity.

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[132] *See* Kober v. Westinghouse Electric Co., 3 FEP Cases 326 (W.D. Pa. Mar. 29, 1971); Ridinger v. General Motors Corp., 39 U.S.L.W. 2548 (S.D. Ohio Mar. 24, 1971); Garneau v. Raytheon Co., 323 F. Supp. 391 (D. Mass. 1971); Vogel v. Trans World Airlines, C.A. 1706-3 (W.D. Mo. Sept. 25, 1970, as amended by order of Jan. 19, 1971); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970); Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd* — F.2d — (9th Cir. 1971). *Cf.* Mengelkoch v. Industrial Welfare Comm'n., 437 F.2d 563 (9th Cir. 1971). All of these cases were brought by factory workers and clerical workers against state laws with the exception of *Grabiec*, which was a request for declaratory judgment by two companies caught between the state hour law and the demands of women employees (backed by the EEOC and court decisions) for overtime and promotions.

At common law, a woman who married became a legal non-person—a *femme couverte*.[133] Upon marriage, she lost virtually all legal status as an individual human being and was regarded by the law almost entirely in terms of her relationship with her husband. Statutory developments in the nineteenth and early twentieth centuries tended to frame a more dignified but nevertheless distinct and circumscribed legal status for married women. At the present time domestic relations law is based on a network of legal disabilities for women, supposedly compensated by a corresponding network of legal protections. The law in this area treats women, by turns, as mental incompetents and as more mature persons than men of the same age; as valuable domestic servants of their husbands and as economic incompetents; as needing protection from their husbands' economic selfishness and as needing no protection from their husbands' physical abusiveness. In many respects, such as name and domicile, the law continues overtly to subordinate a woman's identity to her husband's.

Much of the national discussion about women's status has focused on marriage and divorce laws, and rightly so, because the issues involved are important to people personally, and because women's domestic role has traditionally been considered their primary one. Unquestionably, the trend in marriage and divorce law is in the direction of treating the spouses equally or on the basis of their individual capacities. Progressive present-day models for change in the area of family law eliminate virtually all differentiation on the basis of sex.[134] Thus, in most instances, the effect of the Equal Rights Amendment on marriage and divorce law will be to move the law more directly, more forcefully, and more expeditiously in the direction it is already going.

In considering the following discussion of the impact of the Equal Rights Amendment on some aspects of domestic relations law, the reader should keep in mind the law's limited power to predetermine and control the nature of intimate personal relationships. In the realm of marriage and the family, social customs, economic realities, and individual preferences have a far greater influence on behavior than the law. This is not to say that the law does not play an important role in shaping and channeling these other forces, but rather to point out that a change in the law—insofar as the change leaves room for choice, as do the possibilities suggested below—will not result in immediate widespread change in what are essentially social customs. Furthermore, it is important to remember that the impact of the marriage and divorce laws varies according to the economic class of the family. In preparing this section, we have been limited by the dearth of academic research about the differential impact of domestic relations law according to economic class.[135]

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[133] Blackstone said, "By marriage, the husband and wife are one person in law: . . . [T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and *cover* she performs everything; and is therefore called, in our law-French a *feme-covert*; *foemina viro co-operta*; is said to be *covert baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage." 1 W. BLACKSTONE, COMMENTARIES *442.

[134] *See, e.g.*, UNIFORM MARRIAGE AND DIVORCE ACT (Final Draft, 1970).

1. *Laws Affecting the Act of Marriage*

The statutory requirements for a lawful marriage are generally very simple. They include in most states a valid license, a waiting period before issuance of the license, a medical certificate, proof of age, parental consent for parties below the age of consent, and a ceremony of solemnization. Of these, only age requirements for marriage with and without parental consent involve widespread discrimination on the basis of sex.[136] A 1967 survey of state marriage laws by the United States Department of Labor showed that only ten states set the same minimum age for marriage (age below which marriage, even with parental consent, is prohibited) for men and women. Only eighteen states set the same age of consent (age at which marriage is permitted without parental consent) for both men and women.[137] In every state with an age differential, the minimum age for men was one to three years higher than the minimum age for women.[138]

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[135] Examples of such studies include W. Gellhorn, *A Study on the Administration of Laws Relating to The Family in The City of New York*, in SPECIAL COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK (1954); R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS (1969) [hereinafter cited as LEVY].

[136] In general the requirements for physical examination before marriage apply equally to men and women. In Washington, however, only men are required to answer questions about contagious venereal disease. WASH. REV. CODE § 26.04.210 (Supp. 1970). Such a distinction is based on the Victorian fiction that only men will engage in premarital intercourse. The underlying health reasons for requiring men to be examined apply equally to women. Although physical examination is presumably for protection of the new spouse, the requirement of examination for venereal disease is a useful public health measure. It obviously should not be struck down where it applies unequally to men and women, but rather extended to women, as it already has been in most states.

[137] *See* CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN, REPORT OF THE TASK FORCE ON FAMILY LAW AND POLICY, APPENDIX B at 62 (1968) [hereinafter cited as REPORT ON FAMILY LAW]. The states which set the same age of consent are: Connecticut, Florida, Georgia, Hawaii, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia and Wyoming. *See, e.g.*, KY. REV. STAT. § 402.210 (1969); PA. STAT. ANN. tit. 48, § 1-5(c) (1965).

[138] The original basis for this differential was the presumption that women reached

Since the minimum marriage age in all states is now well above the normal age of puberty, physical capacity to bear children can no longer justify a different statutory marriage age for men and women. Instead there seem to be two current rationales for the higher marriage age for men. One is that, mentally and emotionally, women mature earlier than men. Maturity is such a relative and subjective concept that a court could never use it as a test for an inborn characteristic distinguishing all women from all men. Furthermore, mere estimates of emotional preparedness founded on impressions about the "normal" adolescent boy and girl are based on the kind of averaging which the Equal Rights Amendment forbids. The other rationale for the age difference is that men should not be distracted during adolescence from education and other preparation for earning a living. This rationale is obviously untenable: the law should give as much encouragement to women to prepare themselves to earn a living as it gives to men.[139]

Under the Equal Rights Amendment, a court challenge to the age differential would most likely be made by a man suing to require issuance of a license to him at the lower women's age. Faced with such a challenge to the state law a court would have to find, for the reasons just discussed, that the marriage age differential did not meet the strict criteria of the unique physical characteristics tests required by the Equal Rights Amendment. Once it had concluded that a state could not constitutionally set one marriage age for men, and one for women, a court would be able to increase the marriage age for women upward to match the age for men, on the theory that the state should be equally solicitous of a woman's training as a man's. Or a court might find that the legislature had pegged the age for men unreasonably high and revise the marriage age for men downward to correspond to the marriage age for women. A legislature reconsidering laws about the minimum age for marriage, either before or after a court challenge, would have to set a single age for men and women after weighing the policy considerations underlying the age limit. These considerations might indicate the higher age, the lower age, or an age in between the two.[140]

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puberty earlier than men. The common law ages of consent—14 for males, 12 for females—represented estimates of the ages when children became physically capable of producing children. KANOWITZ, *supra* note 2, at 10.

[139] For a decision sustaining legislative judgment about age of majority differentials under current constitutional doctrines, see Jacobson v. Lenhart, 30 Ill. 2d 225, 195 N.E.2d 638 (1964).

[140] The considerations which should shape a legislature's judgment in setting a minimum marriage age are outlined in LEVY, *supra* note 135, at 24-25. The drafters of the Uniform Marriage and Divorce Act chose the lower "women's" ages of 18 for mar-

2. *Merger of the Woman's Legal Identity into Her Husband's*

a. *Name Change.* The requirement that a woman assume her husband's name at the time she marries him is based on long-standing American social custom. It is also firmly entrenched in statutory and case law.[141] In some states statutes indicate that a married woman must not only take but keep her husband's name.[142] Women who continue to use their maiden names after marriage may encounter resistance from the Internal Revenue Service, voting registrars, motor vehicles departments, or any number of non-governmental sources.

The Equal Rights Amendment would not permit a legal requirement, or even a legal presumption, that a woman takes her husband's name at the time of marriage. In a case where a married woman wished to retain or regain her maiden name or take some new name, a court would have to permit her to do so if it would permit a man in a similar situation to keep the name he had before marriage or change to a new name. Thus, common law and statutory rules requiring name change for the married woman would become legal nullities. A man and woman would still be free to adopt the same name, and most couples would probably do so for reasons of identification, social custom, personal preference, or consistency in naming children. However, the legal barriers would have been removed for a woman who wanted to use a name that was not her husband's.

Some state legislatures might decide there was a governmental interest, such as identification, in requiring spouses to have the same last name. These states could conform to the Equal Rights Amendment by requiring couples to pick the same last name, but allowing selection of the name of either spouse, or of a third name satisfactory to both.[143] Similarly, statutes which now permit the judge in a divorce case to use discretion in determining whether to allow a woman to resume her maiden name or to take a new name would be extended under the Equal Rights Amendment to cover all men, or at least men who had

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riage without parental consent and 16 for marriage with consent. UNIFORM MARRIAGE AND DIVORCE ACT § 203(1).

[141] KANOWITZ, *supra* note 2, at 42.

[142] *See, e.g.*, IOWA CODE ANN. § 674.1 (1950), permitting a court to change the name of "any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female . . ."

[143] The West German federal government has recently proposed legislation along these lines. Part of a large-scale reform of family and divorce legislation, "the bill breaks an ancient tradition of male priority in family names. It will permit marriage partners to adopt the wife's maiden name if they choose or to use it in combination with the husband's surname." Binder, *Bill in Bonn Encourages German Penchant for Double Names*, N.Y. Times, May 20, 1971, at 2, col. 3.

changed their names at marriage. Moreover, any state coercion regarding an individual's choice of name might still be open to attack under developing constitutional principles of due process and privacy.

In a state where both spouses were required to have the same last name, the children would simply take their parents' name. If the state had no requirement that husband and wife take the same name, it could either require that parents choose one of their names for their children, or it could decide to have no rule at all. The Amendment would only prohibit the states from requiring that a child's last name be the same as his or her father's, or from requiring that a child's last name be the same as his or her mother's.

b. *Domicile.* The location of a person's domicile affects a broad range of legal rights and duties, including the place where he or she may vote, run for public office, serve on juries, receive free or lowered tuition at a state school, be liable for taxes, sue for divorce, and have his or her estate administered. The common law rule for determining the wife's domicile was simple. the domicile of the wife merged in that of her husband; moreover, she had the duty to follow him if his choice was a reasonable one, and her refusal to do so was considered desertion.[144] Legislative or judicial changes have modified this blanket rule in most states for some purposes, most commonly for divorce jurisdiction. However, only three states—Alaska, Arkansas, and Wisconsin—permit a woman to have a separate domicile from her husband for all legal purposes.[145]

A court suit challenging discriminatory domicile rules could arise after a woman had been denied some right or benefit because her husband's domicile had been imputed to her.[146] In such a suit a court would have to hold that the Equal Rights Amendment requires rules governing domicile to be the same for married women as for married men. Extending women's dependent status to men would simply create a circular situation with each spouse's domicile dependent on the other's. Thus, equal treatment of men and women for purposes of domicile implies giving married women the same independent right to choice of domicile as married men now have. A court would probably resolve the inequality by striking down whatever statute or portion of a statute sets out a special rule for married women. It would leave standing the general domicile law which would automatically be extended to married women. For similar reasons, a court would do away with the rule that refusal to accompany or follow a husband to a new domicile amounts to desertion or abandonment.[147] A husband would no longer have grounds for divorce in a wife's unjustifiable refusal to follow him to a new home, unless the state also permitted the wife to sue for divorce if her husband unjustifiably refused to accompany her in a move.

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[144] J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS 146 (1931).

[145] ALASKA STAT. ANN. § 25.15.110 (1962); ARK. STAT. ANN. §§ 34-1307 to -1309 (1962); WIS. STAT. ANN. § 246.15 (Supp. 1970).

[146] *See also* Clarke v. Redeker, 259 F. Supp. 117 (S.D. Iowa 1966), in which a man wanted to adopt his wife's domicile to get the benefit of lower tuition at the state university.

These results would cause little disruption and would be beneficial to those women who are now adversely affected by the domicile law. Professor Kanowitz concludes that the domicile rule

> has become useless as an influence within the family. Its most important practical effects are to deprive wives of certain governmental benefits they would otherwise have and to create technical legal difficulties for third parties. The cases in which the issue is raised typically do not involve the resolution of a dispute between spouses in an ongoing marriage. . . . Its retention serves only to evoke bygone images of the husband as master and the wife as obedient servant.[148]

With respect to children, the traditional rule is that the domicile of legitimate children is the same as their father's.[149] Even those states which permit a married woman to have a separate domicile from her husband appear to retain this rule with respect to the child's domicile.[150] The Equal Rights Amendment would not permit this result.

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[147] *See* Annot., 29 A.L.R.2d 474 (1953), citing cases from 29 states which held that a wife's refusal to follow her husband to a new domicile is desertion by her and grounds for divorce proceedings.

[148] KANOWITZ, *supra* note 2, at 52. *See also* H. CLARK, DOMESTIC RELATIONS 151 (1968), who concludes,

> Therefore, the correct principle is that the wife is able to acquire a separate domicile of choice whenever she lives apart from her husband, regardless of the circumstances.

[149] MADDEN, *supra* note 144, at 453. Illegitimate children follow the domicile of their mothers.

[150] The law on children's domicile is confused because the states have failed to integrate the statutes removing women's civil disabilities with those which determine children's domicile. Thus the provisions of Arkansas law defining a woman's domicile as independent from that of her husband, ARK. STAT. ANN. §§ 34-1307 to -1309 (1962), enacted in 1941, did not affect Arkansas' adherence to the common law rule "that the last domicile of the deceased father of an infant constitutes his legal domicile. . . ." Bell v. Silas, 223 Ark. 694, 268 S.W.2d 624 (1954). The impact of Wisconsin's 1965 law titled "Women to have equal rights," WIS. STAT. ANN. § 246.15 (Supp. 1970) on the law of children's domicile has not yet been judicially determined. The most recent Wisconsin case on the subject, Town of Carlton v. State Dept. of Public Welfare, 271 Wis. 465, 74 N.W.2d 340 (1956), followed the traditional rule, embodied in Wisconsin's public assistance statute, that "the domicile of a minor child . . . is that of its father." 271 Wis. at 469. *Cf.* ALASKA STAT. ANN. § 25.15.110 (1962) (removing women's civil disabilities) as

Either by legislative action or judicial determination, a state would have to devise a sex-neutral basis for determining the child's domicile. The most reasonable domicile would be the place the child actually lives most of the time. If the family lives together but one of the parents is domiciled in a separate place, the child's domicile should be the place of family residence. If the parents live apart, then the child's domicile should be the domicile of the parent with whom he or she lives most of the time. Alternatively, the state could allow the child to determine his or her own domicile on the basis of where he or she actually lives or works, if apart from both parents.

3. *Rights of Husbands and Wives Inter Se*

The reluctance of courts to interfere directly in an ongoing marriage relationship is a standard tenet of American jurisprudence.[151] As a result, legal elaboration of the duties husbands and wives owe one another has taken place almost entirely in the context of the breakdown of the marriage—either voluntary breakdown through separation, desertion, or divorce, or involuntary breakdown through incapacitation or death. Any legal changes required by the Equal Rights Amendment are thus unlikely to have a direct impact on day-to-day relationships within a marriage, because the law does not currently operate as an enforcer of a particular code of relationships between husband and wife.

a. *Rights of Consortium.* One of the law's most comprehensive efforts to define the rights and obligations of the partners to a marriage relationship occurs in personal injury actions, after one or the other spouse has been seriously incapacitated. In order to instruct the jury as to the proper standards for awarding damages, the judge must define what benefits the plaintiff should have expected from his or her now incapacitated spouse. At common law these standards were rigidly defined and totally male-oriented. A man had a right to recover damages for loss of his wife's services when she was injured by intentional or negligent action. In time, a husband's rights of consortium were defined to include love, affection, companionship, society, and sexual relations. A woman, by contrast, had no right to sue for loss of her husband's services, since in theory, he provided none.[152]

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compared with ALASKA STAT. ANN. § 25.05.040 (1962) (giving fathers preference in child custody).

[151] This reluctance received a constitutional foundation in Griswold v. Connecticut, 381 U.S. 479 (1965).

[152] This background is reviewed in Karczewski v. Baltimore & Ohio R.R., 274 F. Supp. 169, 171 (N.D. Ill. 1967).

The Equal Rights Amendment would not permit men to have a greater right than women to recover for loss of their spouse's services and companionship. Courts in many states have already extended to women the right to sue for loss of consortium, although some courts continue to uphold this differential between men's and women's rights.[153] The Equal Rights Amendment would settle the current uncertainty and disagreement among the states by requiring them all to grant women the same right to sue that men now have.

More fundamentally, however, the Equal Rights Amendment would prohibit enforcement of the sex-based definitions of conjugal function, on which the discriminatory consortium laws are based. Courts would not be able to assume for any purpose that women had a legal obligation to do housework, or provide affection and companionship, or be available for sexual relations, unless men owed their wives exactly the same duties. Similarly, as discussed more fully below, men could not be assigned the duty to provide financial support simply because of their sex.

b. *Allocation of The Duty of Family Support between Husband and Wife.* In all states husbands are primarily liable for the support of their wives and children, although the details of this liability and the possible defenses vary. A wife may be liable for supporting her husband in many states, but generally only if the husband is incapacitated or indigent. In most states the mother is liable for support of the children only if the father refuses or fails to provide for their support.[154]

Criminal nonsupport laws are the legal system's most heavy-handed technique for enforcing the husband's current duty of support. Nonsupport was not an indictable offense at common law.[155] But criminal

[153] *See* cases collected in Karczewski v. Baltimore & Ohio R.R., 271 F. Supp. 169, 172 n.2 (N.D. Ill. 1967), and Gates v. Foley, 247 So. 2d 40, 42 n.1 (Fla. 1971). The first case to extend the right to sue for loss of consortium to women was Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950). Cases striking down the traditional discrimination against women on the grounds that it denied equal protection of the laws include Owen v. Illinois Baking Corp., 260 F. Supp. 820 (W.D. Mich. 1966) and Karczewski v. Baltimore & Ohio R.R., *supra. Contra,* Miskunas v. Union Carbide Corp., 399 F.2d 847 (7th Cir. 1968).

[154] The support laws also favor male children in seven states, since the right to support is terminated when the child reaches the age of majority, 39 AM. JUR. *Parent and Child* §§ 35, 40 (1942), and this age is set higher for males than for females. The following statutes set age of majority at 18 for females and 21 for males: ARK. STAT. ANN. § 57-103 (1947); IDAHO CODE ANN. § 32-101 (1963); NEV. REV. STAT. § 129.010 (1963); N.D. CENT. CODE § 14-10-01 (1960); OKLA. STAT. ANN. tit. 15 § 13 (1966); S.D. COMP. LAWS ANN. § 26-1-1 (1967); UTAH CODE ANN. § 15-2-1 (1953). The implicit premise of these laws—that girls will be or should be married by the time they are 18 and no longer dependent on parents' support—is obviously improper under the Equal Rights Amendment. The considerations involved in equalizing the ages would be the same as for the minimum marriage age, discussed at pp. 938-39 *supra.*

[155] R. PERKINS, CRIMINAL LAW 604 (1969).

statutes in all but three states now penalize a man's desertion or nonsupport of his wife, and all American jurisdictions set criminal penalties for nonsupport of young children.[156] While these laws typically penalize either parent who fails to provide support for a minor child, the duty of interspousal support is placed solely on the man.[157]

The child-support sections of the criminal nonsupport laws would continue to be valid under the Equal Rights Amendment in any jurisdiction where they apply equally to mothers and fathers. However, the sections of the laws dealing with interspousal duty of support could not be sustained where only the male is liable for support. Applying rules of narrow construction of criminal laws, courts would have to strike down nonsupport laws which impose the duty of support on men only. Legislatures might decide not to re-enact any husband-wife criminal nonsupport laws. Criminal sanctions against the husband are widely recognized as poor compensation for a wife's unpaid domestic labor and discriminatory treatment against her in the labor market; a legislature might choose to use its resources for a more direct attack on these problems. Alternatively, a state legislature could adopt a law which makes no distinctions on the basis of sex, like the Model Penal Code's nonsupport provision.[158]

With regard to civil enforcement of support laws, courts could take a more flexible approach. The Equal Rights Amendment would bar a state from imposing greater liability for support on a husband than on a wife merely because of his sex. However, a court could equalize the civil law by extending the duty of support to women. With regard to child support this is already the rule in Iowa, where father and mother are under the same legal duty to support the children.[159]

Alarmists claim that the Equal Rights Amendment would change the institution of the family as we know it by weakening the husband's duty of marital support in an ongoing marriage. This concern is based on a misunderstanding of the role laws about support actually play. Many courts flatly refuse to enter a support decree when the husband and wife are living together. In most such cases the husband, as head of the family, is free to determine how much or how little of his property his wife and children will receive.[160]

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[156] *See, e.g.*, MODEL PENAL CODE § 207.14, Comment 2 at 189 (Tent. Draft No. 9, 1959).

[157] *E.g.*, UNIFORM DESERTION AND NONSUPPORT ACT, 10 Uniform Laws Annotated 1 (1922).

[158] "A person commits a misdemeanor if he persistently fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child, or other dependent." MODEL PENAL CODE § 230.5 (Proposed Official Draft, 1962).

[159] Picht v. Henry, 252 Iowa 559, 107 N.W.2d 441 (1961).

[160] CLARK, *supra* note 148, at 185-86.

The Equal Rights Amendment would *not* require mathematically equal contributions to family support from husband and wife in any given family. A functional definition of support obligations, based on current resources, earning power, and nonmonetary contributions to the family welfare, would be permissible and practical under the Equal Rights Amendment, so long as the criteria met the tests of reasonable classification described above in Part III(C).[161] If husband and wife had equal resources and earning capacity, neither would have a claim for support against the other. However, if one spouse were a wage earner and the other spouse performed uncompensated domestic labor for the family, the wage-earning spouse would owe [illegible] of support to the spouse who worked in the home. Creating [illegible] spouse equal liability for support might give credit[illegible]tage in some instances where they would not currently be able to reach the wife's resources. If this extra liability created hardship for families, the legislature could make rules limiting the extent of creditors' access to a family's resources.

c. *Ownership of Property.* The law has attempted to recognize women's contribution to the family by giving each spouse an interest in property acquired during the marriage. Two different systems have been adopted in the United States for distributing property rights within a family—the community property system and the common law system. In both systems the woman's right matures primarily upon separation or death of her spouse. As both systems currently operate, they contain sex discriminatory aspects which would be changed under the Equal Rights Amendment.

(1) *Community Property.* In the eight community property states —Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—property acquired by each spouse during the marriage is owned in common by both husband and wife.[162] This system is sometimes championed by advocates of women's rights because it gives a housewife who earns no independent income a legal share in the family property.[163] However, in all the community states, except Texas

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161. See the discussion at p. 899 *supra*.

162. Property acquired by gift, bequest, devise, or descent is generally excepted and becomes the separate property of the spouse by whom it was acquired, as is property owned by either spouse at the time of marriage. MADDEN, *supra* note 144, at 131-32.

163. But for an attack by a women's rights organization on one aspect of the community property system, see brief amicus curiae submitted in Perez v. Campbell, 421 F.2d 619 (9th Cir. 1970), *cert. granted*, 400 U.S. 818 (1970), *leave to file brief amicus curiae granted*, 400 U.S. 989 (1971) (challenging the suspension of an Arizona woman's driver's license and car registration for debts arising from an accident while her husband was driving the community car). See also Mitchell v. Commissioner, 430 F.2d 1 (5th Cir.

and Washington, the husband has power of management and control over the community property; and in some states he can assign, encumber or convey the property without his wife's consent.[164] Thus, in some of the community property states a working wife may be put in the position of a woman before passage of the Married Women's Property Acts: she may lose control of her own earnings to her husband.[165]

Under the Equal Rights Amendment, laws which vest management of the community property in the husband alone, or favor the husband as manager in any way, would not be valid.[166] In the absence of new legislation, the courts would leave decisions about disposition of the community property to be made jointly by husband and wife. This would be consistent with the general judicial preference to allow married couples to work matters out between themselves.

Legislatures might prefer to follow the example of the recent amendment of the Texas community property law. The new Texas law provides that

> each spouse shall have sole management, control and disposition of that community property which he or she would have owned if a single person.[167]

Rather than leaving decisions about the community property to husband and wife together, this rule would give the spouse who had earned or been given property the power to dispose of it. This rule obviously favors the wage-earning spouse, who in most instances under current conditions will be the man. Thus it would require scrutiny as a rule neutral on its face, which falls more heavily on one sex than the

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1970); *cert. granted sub nom.* United States v. Mitchell, 400 U.S. 1008 (1971) (woman's liability for husband's federal income tax).

[164] MADDEN, *supra* note 144, at 135.

[165] Washington and Texas give the wife control over her earnings. WASH. REV. CODE ANN. 26.16.140 (1961); TEXAS REV. CODES ANN., Family Code, tit. 1, § 5.22 (Pamphlet, 1969). California has modified the rule to allow the wife to spend her earnings "for valuable consideration" without the husband's consent. CAL. CIV. CODE § 171c (West 1954), reenacted as CAL. CIV. CODE § 5124 (West 1970). In four states, the wife's earnings are separate only if she is living separately. ARIZ. REV. STAT. ANN. § 25-213(c) (1956); IDAHO CODE ANN. § 32-909 (1963); NEV. REV. STAT. § 123.180 (1963); N.M. STAT. ANN. 57-3-7 (1962). *See also* LA. CIV. CODE ANN. Art. 2399 (West 1952).

[166] Similarly, laws which give the husband greater testamentary power over the community property would also fall. For example, in New Mexico, if the wife dies first the husband gets all the community property, but if the husband dies first, the wife has a legal right to bequeath only half the community property, the rest to be distributed as the husband decrees in his will. N.M. STAT. ANN. §§ 29-1-8 (1953), 29-1-9 (Supp. 1969). This law would clearly violate the Equal Rights Amendment. The inequality could be resolved either by giving the wife all the community property if the husband dies first, or by limiting the surviving husband's share to one half the community property as the wife's share is now limited. The latter is more consistent with the practice in the common law states.

[167] TEXAS REV. CODES ANN., Family Code, tit. 1, § 5.22 (Pamphlet, 1969).

other.[168] The Texas law also states that property of one spouse which is mixed or combined with property of the other spouse is subject to the joint control of husband and wife unless they agree otherwise. This part of the law would certainly be valid under the Equal Rights Amendment.

(2) *Common Law Ownership.* The other forty-two states have a common law basis for distributing marital property. However, Married Women's Property Acts in every state have modified the harsh common law principles that gave the husband complete control over his wife's property and the products of her labors. With certain exceptions these statutes give a woman the right to control property she owned before marriage as well as property she earns or receives by gift or devise during marriage.[169] Except for qualifications relating to the right of a surviving spouse to inherit, therefore, each spouse now owns his or her separate property free of legal control of the other spouse.

The Married Women's Property Acts did not automatically abolish the common law estates of dower and curtesy, but today most states have abandoned these cumbersome devices for protecting the interests of widows and widowers, and others have modified them substantially. In their place, the states have substituted other forms of protection of a marital share of the property of one or both spouses. All states except North Dakota and South Dakota give the woman a nonbarrable share in her husband's estate, but a number of states fail to give the husband a corresponding legal claim in his wife's estate.[170] The widow's allowance or family allowance, homestead, and limitation on gifts to charity are other devices to protect a surviving spouse against complete disinheritance.

Where these devices give the surviving husband rights equal to the surviving wife, they would be valid under the Equal Rights Amendment.[171] In the many states, however, where the wife still has a protected position, the discriminatory laws would either be invalidated or extended. Where a legal device has proved to be a useful protection, legislatures would probably be inclined to extend its coverage to men, but where the technique has provided little real protection, the legislature could take the opportunity for review provided by the Equal Rights Amendment to revise or repeal the law.

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[168] *See* the discussion in Part III (C), at p. 899 *supra*. The Texas law creates a situation similar to the rule in common law jurisdictions concerning control of property, and would be upheld if the common law system were upheld.

[169] In a few states a married woman must still get her husband's permission to convey her own land. 1 POWELL, REAL PROPERTY ¶ 118 (1949). An occasional court grants the husband control of the family home, even if the wife owns the property, by virtue of his position as head of the household. KANOWITZ, *supra* note 2, at 59. The uncompensated value of a housewife's labor is not considered property under these statutes.

[170] *See* W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 21-24 (1960).

[171] The Uniform Probate Code, approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, gives a "surviving spouse" an elective share of one-third in the decedent's estate. UNIFORM PROBATE CODE § 2-201.

d. *Grounds for Divorce.* Professor Leo Kanowitz points out that "there is almost an air of unreality about the enumeration of specific grounds of divorce found in the statutes of all the states."[172] This is because the great mobility of middle class Americans permits them to go to a state which has liberal grounds for divorce, or abroad, when they want to dissolve a marriage. In addition, a high proportion of couples seeking divorce agree to allege as fictions the requisite grounds for divorce. Furthermore, divorce laws have typically been written in terms that make sense only to an ongoing marriage, permitting divorce if, and only if, a fundamental element of the marriage compact has been violated.

Recognizing these factors, as well as the unreasonableness of permitting divorce only for certain limited and specific reasons, proponents of legislative reform recommend evaluating the overall health of the marriage rather than pinning particular guilty action on one or the other of the spouses. The Uniform Marriage and Divorce Act, adopted by the National Conference of Commissioners on Uniform State Laws, provides for a decree of separation or divorce to be granted upon a finding that "the marriage is irretrievably broken."[173] California currently permits divorce on a finding of irreconcilable differences between the parties.[174] North Carolina, Ohio, and the District of Columbia permit a divorce after voluntary separation for a year.[175] Nevertheless, the statutory grounds for divorce which remain in effect in most states are of concern because they still control in contested divorce situations, because they affect the economic and personal relations of the parties even in consent divorces, and because there is evidence that they cause a disproportionate amount of difficulty to poor people.[176]

In the past many grounds for divorce were highly sex discriminatory; today only a few apply solely to one sex or the other. These are non-age,[177] pregnancy by a man other than husband at time of marriage,[178] nonsupport,[179] alcoholism of husband if and only if accompanied by wasting of his estate to the detriment of his wife and children,[180] wife's unchaste behavior (without actual proof of adultery),[181] husband's vagrancy,[182] wife's absence from state for ten years without husband's consent,[183] wife's refusal to move with husband without reasonable cause,[184] wife a prostitute before marriage,[185] husband a drug addict,[186] indignities by husband to wife's person,[187] and wilful neglect by husband.[188]

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[172] Kanowitz, *supra* note 2, at 95.

[173] Uniform Marriage and Divorce Act § 302.

[174] Cal. Civ. Code § 4506(1) (West 1970).

[175] N. C. Gen. Stat. § 50-6 (1966); Ohio Rev. Code § 3105.01(B) (Baldwin 1960); D. C. Code Ann. § 16-904(a) (1967). *See also* the Citizens' Advisory Council's recommendation that lapse of time be the only substantial requirement for divorce. Report on Family Law 36-37.

[176] Levy, *supra* note 135, at 79.

Except for nonsupport and pregnancy, all the sex discriminatory grounds for divorce listed above are anachronisms, surviving in only one or two states, and are not deserving of extended discussion here. In each instance, a court could invalidate such a provision without doing any serious harm to the overall structure of the state's divorce law. On the other hand, the court could also extend the law to the opposite sex without risking serious criticism that it was usurping legislative authority. Even without the pressure of the Equal Rights Amendment, these provisions are likely to be dropped or extended to the opposite sex in the course of divorce law reform.

Of the thirty states which allow a woman a divorce for nonsupport, only two—Arkansas and North Dakota—give a husband whose wife has failed to support him a cause of action.[189] This disparity is a reflection of the sex bias in support laws, described above.[190] Like the duty of support during marriage and the obligation to pay alimony in the case of separation or divorce, nonsupport would have to be eliminated as a ground for divorce against husbands only, or else extended to the wife where the husband was without resources and the wife had the financial capacity to support him.

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[177] See the discussion of differential age of consent at pp. 938-39 *supra*.

[178] A ground for divorce in at least thirteen states: Alabama, Arizona, Georgia, Iowa, Kentucky, Mississippi, Missouri, New Mexico, North Carolina, Oklahoma, Tennessee, Virginia, and Wyoming. *See, e.g.*, N.C. Gen. Stat. § 50-5(3) (1966); Va. Code Ann. § 20-91(7) (Cum. Supp. 1970).

[179] A ground for divorce in thirty states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Idaho, Indiana, Kansas, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming. Report on Family Law 66. *See, e.g.*, Cal. Civ. Code Ann. § 105 (West 1954); Mass. Gen. Laws Ann. ch. 208, § 1 (1969).

[180] Kentucky only. Ky. Rev. Stat. § 403.020(3)(a) (1960). The husband can get a divorce for his wife's alcoholism without any qualifications.

[181] Kentucky only. Ky. Rev. Stat. § 403.020(4)(c) (1960).

[182] Missouri and Wyoming. Mo. Ann. Stat. § 452.010 (1949); Wyo. Stat. Ann. § 20-38, *Ninth* (1957).

[183] New Hampshire only. N.H. Rev. Stat. Ann. § 458-7, XII (1955).

[184] Tennessee only. Wife must remain wilfully absent for two years. Tenn. Code Ann. § 36-801(8) (1955).

[185] Virginia only. Va. Code Ann. § 20-91(8) (Cum. Supp. 1970).

[186] Alabama only. Ala. Code tit. 34 § 20(6) (1959).

[187] Tennessee only. Tenn. Code Ann. § 36-802 (1955).

[188] Montana only. Mont. Rev. Codes Ann. § 21-115 (1967).

[189] Ark. Stat. Ann. § 34-1202, *Ninth* (Cum. Supp. 1969); N.D. Cent. Code § 14-05-07 (1960).

[190] See the discussion at p. 945 *supra*.

The laws that grant a husband a divorce because at the time of marriage he did not know his wife was pregnant by another man would be subject to strict scrutiny under the unique physical characteristics tests. As with paternity laws, the argument can be made that the ease of identifying the mother of a child, as opposed to the difficulty of identifying the father, is a kind of unique physical characteristic which justifies different rules regarding the relationship of mothers and fathers to illegitimate children. However, no reason exists for distinguishing between the duties and obligations of the mother and the father when the father of an illegitimate child has acknowledged paternity or has been adjudged the father in a paternity proceeding. Furthermore, the divorce laws are not based primarily upon the physical act of giving birth but upon other considerations. The laws derive, at least in major part, from the fact that any child born of a woman during marriage is presumed to be her husband's child. Whether the husband claims the child or not, the law imposes on him the duty to support the child and gives the child his name. In this respect the law places an unequal burden on the husband, for his wife receives no corresponding obligations to support or nurture any children her husband may conceive. Since the Equal Rights Amendment would require men and women to bear equal responsibility for the support and nurture of their children, it eliminates most of the justification for giving men alone this ground of divorce. The Equal Rights Amendment would permit resolution of the disparity either by giving a woman a claim for divorce if, at the time of marriage, she did not know that her husband had impregnated another woman, or by abolishing the ground altogether.

e. *Alimony.* Alimony following divorce involves issues similar to those discussed above in connection with support laws. However, a different set of laws and rules is involved. In jurisdictions where fault is still central to divorce proceedings, alimony awards are closely linked to the judicial determination of fault.[191] More than one-third of the states authorize divorce courts to grant alimony to either spouse, but the remaining jurisdictions permit alimony awards to the wife only.[192]

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[191] The functions and purposes of alimony are summarized in CLARK, *supra* note 148, at 441-42.

The Equal Rights Amendment would not require that alimony be abolished but only that it be available equally to husbands and wives. This result is consistent with the recommendations of Robert Levy to the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws, who concludes,

> [T]he distinction [permitting alimony for wives but not husbands] is an historical idiosyncrasy; there is no principled reason for maintaining the distinction between husbands and wives; almost all recent commentators and official studies of divorce-property doctrines have recommended that the distinction be abolished.[193]

Alimony laws could be written to grant special protection to a spouse who had been out of the labor force for a long time in order to make a non-compensated contribution to the family's well-being. Similarly the laws could provide support payments for a parent with custody of a young child who stays at home to care for that child, so long as there was no legal presumption that the parent granted custody should be the mother.[194] In short, as long as the law was written in terms of parental function, marital contribution, and ability to pay, rather than the sex of the spouse, it would not violate the Equal Rights Amendment.

The maintenance provisions of the Uniform Marriage and Divorce Act serve as an example of the kind of law which would be valid under the Equal Rights Amendment. The Act provides for maintenance to be paid from one spouse to the other if the spouse seeking maintenance lacks sufficient property to provide for his reasonable needs and is unable to support himself through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the parent not seek employment outside the home. The amount and duration of payments for maintenance are to be determined after the court considers the financial resources of the party seeking maintenance, the time necessary to acquire sufficient training to enable the party to find appropriate employment, the standard of living established during the marriage, the duration of the marriage, the age and physical and emotional condition of the spouse seeking maintenance, and the ability of the spouse from whom maintenance is sought to meet his or her own needs while making maintenance payments.[195]

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[192] *See* REPORT ON FAMILY LAW 7.

[193] LEVY, *supra* note 135, at 147.

[194] See for an example of this assumption, Family Law Committee, Connecticut Bar Association, *Proposal for Revision of the Connecticut Statutes Relative to Divorce*, 44 CONN. BAR J. 411 (1970). Section 18 provides that when assessing alimony, "in the case of a *mother* to whom the custody of minor children has been awarded, the desirability of the *mother* securing employment" should be a consideration. *Id.* at 429 (emphasis added).

f. *Custody of Children.* At common law the father, if living, was the natural guardian of his child and as such was nearly always entitled to custody of the children in case of separation or divorce.[196] Some states, including California and Utah, changed this by statute which prefers the mother if the child is young.[197] Others, including Missouri, Florida, Minnesota, New York, and Colorado, give both spouses equal right to custody of the children.[198] In most states there is no statute favoring one parent or the other; rather, preference for the mother or father exists as a result of judicially created presumptions in favor of the mother for girls and young children and in favor of the father for older boys.[199]

The Equal Rights Amendment would prohibit both statutory and common law presumptions about which parent was the [illegible] guardian based on the sex of the parent. Given present social realities and subconscious values of judges, mothers would undoubtedly continue to be awarded custody in the preponderance of situations, but the biack letter law would no longer weight the balance in this direction.

4. *Summary*

The present legal structure of domestic relations represents the incorporation into law of social and religious views of the proper roles for men and women with respect to family life. Changing social attitudes and economic experiences are already breaking down these rigid stereotypes. The Equal Rights Amendment, continuing this trend, would prohibit dictating different roles for men and women within the family on the basis of their sex. Most of the legal changes required by the Amendment would leave couples free to allocate privileges and responsibilities between themselves according to their own individual preferences and capacities. By and large these changes could be made by courts in the process of adjudicating claims under the Amendment. In any area where the legislature felt that sudden extension of the law to men and women alike would cause undue hardship, it could pass new legislation basing marital rights and duties on functions actually performed within the family, instead of on sex.

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[195] UNIFORM MARRIAGE AND DIVORCE ACT, §§ 308(a)-(b).

[196] *See* MADDEN, *supra* note 144, at 456-57; CLARK, *supra* note 148, at 584. The father could be deprived of custody only when he was shown to be corrupt or to be endangering the child.

[197] CAL. CIV. CODE ANN. § 4600(a) (West 1970); UTAH CODE ANN. § 30-3-10 (1953).

[198] MO. STAT. ANN. § 452.120 (1952); FLA. STAT. ANN. § 61.13 (West 1969); MINN. STAT. ANN. § 518.17 (1969); N.Y. DOM. REL. LAW § 70 (McKinney 196[illegible]); COLO. REV. STAT. 46-1-5(7) (1967).

[199] *See* CLARK, *supra* note 148, at 585. In ninety per cent of custody cases the mother is awarded the custody. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101, 102 (1962).

C. *Criminal Law*

The Equal Rights Amendment will not affect most criminal laws because statutory definitions of criminal activity make men and women equally liable for most offenses; that is, men and women can commit and be punished for most crimes equally.[200] However, in the area of sexual activity the norm changes. Sex differentiation and sex discrimination pervade laws about overt sexual behavior and behavior with sexual overtones, reflecting the confluence of social stereotypes about gender and sexuality.[201] Many of the laws, such as seduction laws, statutory rape laws, and laws prohibiting obscene language in the presence of women, embody a stereotype of women as frail and weak-willed in relation to sexual activity. Others, such as the prostitution and "manifest danger" laws, display a contradictory social stereotype: women who engage in certain kinds of sexual activity are considered more evil and depraved than men who engage in the same conduct. The Equal Rights Amendment would not permit such laws, which base their sex discriminatory classification on social stereotypes. Courts would generally strike down these laws rather than extend them to men because of the rule of strict construction of penal laws, described above.[202] Legislatures, of course, would be able to extend or re-enact any laws about sex offenses to apply equally to men and to women. A few types of criminal statutes, most notably rape laws, may be justified as deriving their sex bias from physical realities. Here the courts would closely scrutinize the laws to determine whether they fall within the scope of the exception for unique physical characteristics.

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[200] The Equal Rights Amendment would forbid sex discriminatory enforcement just as the Fourteenth Amendment forbids enforcement which discriminates on the basis of race. Yick Wo v. Hopkins, 118 U.S. 356 (1886). However, such attacks involve very difficult problems of proof and are not discussed here. *See*, for a discussion of the recent rapid rise in the crime rate of women, and of changing law enforcement attitudes toward women offenders, Roberts, *Crime Rate of Women Up Sharply Over Men's*, N.Y. Times, June 13, 1971, at 1, col. 1.

[201] The proportion of all women arrested who are arrested for sex offenses, including forcible rape and prostitution, is nearly four times the proportion of all arrested men. F.B.I., U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 124 (1967).

[202] See the discussion in Part IV(B), at p. 915 *supra*.

1. *Sexual Assaults*

Rape laws undoubtedly raise one of the most difficult problems under the Equal Rights Amendment because they deal with such a serious offense and because, though apparently simple, they involve two very different kinds of sex distinction. As most commonly defined in the laws of the states, as well as in the Model Penal Code, rape is the forcing of sexual intercourse by a man on a woman, without her consent.[203] This definition involves two kinds of sex differentiation: only a man can be found guilty as a perpetrator of rape, and only a woman can be the victim of rape.[204] These distinctions are usually not made explicit in the language of the statutes, but their interpretation is central to the treatment of rape laws under the Equal Rights Amendment.

Insofar as rape is defined as penetration into the vagina by the penis, courts could uphold forcible rape laws which limit liability to men as based on a unique physical characteristic of men.[205] Laws which define rape as forced sexual intercourse could also be sustained if a court defined sexual intercourse as an act done only by a man and a woman together, and if the statute clearly and appropriately defined women as the sole victims of rape.[206] Using the criteria described in Part III for determining whether a law bears the necessary close relationship to a unique physical characteristic,[207] a court could conclude that, on balance, the law should be sustained. Among other things, the court might find that rape is an extremely traumatic event for the victim; that most men are capable of penetration, and therefore, rape; that a major proportion of sexual assaults consist of sexual intercourse forced by men; that penetration by a man's penis carries with it the possibility of unwanted pregnancy for the victim and forcible penetration carries high danger of injury to the victim; that a criminal penalty is an appropriate way of deterring rape; and that, accompanied by procedural and substantive rights, the law is sufficiently narrow and specific in its scope to be upheld.

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[203] *See, e.g.*, MODEL PENAL CODE § 213.1 (Proposed Official Draft, 1962).

[204] The language of some rape statutes suggests that either a man or a woman may be guilty of rape. Even these statutes, however, generally preclude the possibility of charging a woman with rape by defining sexual intercourse as the penetration of a man's penis into a woman's vagina, or, in some cases, her mouth or anus. Furthermore, a Yale Law Journal study in 1952 found no reported case in which a woman had been convicted of rape as a principal. See Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55 n 2 (1952). For the general rule that rape can be committed by a male only, see 75 C.J.S. *Rape* § 6 (1952).

In all states, both by common law and statute, only women can be victims of forcible rape; see 75 C.J.S. *Rape* §§ 1, 2, 7 (1952). Forcible sexual assault on an adult male is not defined as rape. Many states have enacted additional laws penalizing nonconsensual sexual assaults on men, but none of these laws bears the extreme penalties of the standard rape laws. A few states severely penalize sexual relations with children of both sexes, but force is not an essential element of those statutes; they are discussed at p. 959 *infra*, in conjunction with statutory rape.

[205] Statutes which define rape as "penetration" generally fail, with Victorian delicacy, to specify what instruments of penetration are included. The common law antecedents of the rape statutes, as well as contemporary case law, indicate that courts have limited the application of rape laws to penetration by a man's penis. However, penetration of a woman's vagina may be made by many instruments other than a man's penis, and with equally devastating consequences for the victim's psyche. Whether or not pregnancy has resulted from the rape is immaterial under current laws; similarly, sterility is not a defense for a man accused of rape. Thus a court might conclude there is no rational reason for differentiating such assaults, of which women are as capable as men, and hold the rape laws invalid unless they extend to women assailants as well as men.

[206] The MODEL PENAL CODE, § 213.1 (Proposed Official Draft, 1962) adopts this definition of rape.

[207] See the discussion in Part III(B), at p. [illegible] *supra*.

Similarly, insofar as a court could find that the rape laws are intended to give special protection from assault to women's vaginas, it could sustain the laws even though their protection is limited to women. A court would conduct an inquiry analogous to that described above for determining whether, under the unique physical characteristics tests, the rape laws could properly be limited to female victims. All or nearly all women's genitals differ from all or nearly all men's genitals in that they can be penetrated in an act of sexual assault against the victim's will. Rape laws could thus be sustained as a legislative choice to give one part of the body (unique to women) special protection from physical attack. By contrast, the statutes which include penetration "per anum and per os" in the definition of rape, could not justifiably be limited to female victims because no physical characteristic unique to women is being protected by these laws. A court could choose between invalidating these broader rape laws or else limiting them to penetration of a woman's genitals. In the case of such a serious offense, courts would probably choose to retain the central and valid portion of the law and invalidate only the part referring to "penetration per anum and per os." Alternatively, the legislature could extend the laws to cover the designated assaults on all persons, regardless of sex.

Rape is only one of a number of nonconsensual sexual acts which are penalized throughout the United States.[208] Laws governing such offenses are based on two related sets of concerns. The first is that unwanted sexual contact may be imposed on a person in ways ranging from physical force and threats to more subtle coercion in the form of deception and abuse of positions of trust and authority. The second range of concerns is that particular groups in the population may be especially susceptible to such sexual coercion. By merging these two aspects of the problem of sexual assault, traditional laws provide highly uneven and irrational coverage permeated by sex discrimination.

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[208] A few states still have statutes which extend the concept of "sexual assault" to the use of obscene or insulting language in the presence of a woman. For instance, Alabama penalizes

> any person who in the presence or hearing of any girl or woman, uses abusive, insulting, or obscene language.

Ala. Code, tit. 14, § 11 (1958). See also Mich. Comp. Laws Ann. § 750.337 (1968); Ariz. Rev. Stat. § 13-377 (1956). A variation on the same theme is a Georgia libel law which forbids anyone to utter or circulate "any defamatory words or statements derogatory to the fair fame or reputation for virtue of any virtuous female," Ga. Code Ann. § 26-2104 (1953). Such laws, based on a stereotyped view that women are morally pure, yet morally fragile, rather than on any unique physical characteristic of women which actually distinguishes them from men, would be invalidated under the Equal Rights Amendment.

With a few notable exceptions, laws which punish sexual intercourse per se as a constructive assault rest on the premise that the female party is incapable of giving meaningful consent.[209] Best known among these are the statutory rape laws, which punish men for having sexual intercourse with any woman under an age specified by law, frequently sixteen.[210] Other laws, covering more specific situations, prohibit men from having sexual intercourse with female wards, patients, and students.[211] A related series of laws explicitly prohibit men from obtaining women's consent to sexual intercourse through misrepresentation, deception, or fraud.[212]

These laws suffer from a double defect under the Equal Rights Amendment. First, they single out women for special protection from sexual coercion, even where men in similar circumstances are equally in need of protection; in this sense the laws are "underinclusive."[213]

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[209] The few statutes which declare young or helpless males incapable of consent are: Colo. Rev. Stat. Ann. § 40-2-25(1)(k) (1963) (intercourse with male under 18 solicited by female); Ill. Ann. Stat. ch. 38, §§ 11-4 and 11-5 (Smith-Hurd 1964) (indecent liberties with a child and contributing to the delinquency of a child, regardless of sex); Ind. Ann. Stat. § 10-4203 (1956) (intercourse with male over 14 knowing he is epileptic, imbecile, feeble minded or insane); Ky. Rev. Stat. § 435.100 (1970) (carnal knowledge of male child under 18); Mich. Comp. Laws Ann. §§ 750.339-340 (1968) (debauching a male under 15); Wash. Rev. Code Ann. § 9-79.020 (1961) (sexual intercourse with male under 18).

[210] *See, e.g.*, 44 Am. Jur. *Rape* § 17 (1942). Some states make an exception for intercourse with women who are not virgins, *e.g.*, Fla. Stat. § 794.05 (1961).

[211] *See, e.g.*, Mich. Comp. Laws Ann. §§ 750.342, 750.341 (1968) (prohibiting intercourse with female wards and patients in mental institutions); D.C. Code Encycl. Ann. § 22-3002 (1967) (penalizing male teachers who have sexual intercourse with any woman currently their student).

[212] Seduction laws penalize men for inducing unmarried women to engage in sexual conduct by a promise, usually of marriage. *See, e.g.*, N.J. Stat. Ann. §§ 2A: 142-1, 142-2 (1969). Michigan, like many other states, makes it a crime for a person to entice a woman under 16 away from her parents or guardian for purposes of prostitution, concubinage, sexual intercourse, or marriage. Mich. Comp. Laws Ann. § 750.13 (1968).

[213] *See, e.g.*, the report of the Carroll County, Maryland, grand jury calling for legislation "to prevent mental and physical harm to unsuspecting, unprepared adolescents by forced, coerced or seduced sexual activity which may warp the development of such children as useful citizens to society." The report was prompted by evidence presented to the grand jury that two women elementary school teachers had seduced boys 11 and 12 years old. The grand jury concluded that the Maryland criminal code provided no statute under which the teachers could be indicted and called for state legislation "giving

To be sure, the singling out of women probably reflects sociological reality: in this society, young women, who learn both that marriage is the most important goal for them and that they may pursue it only passively, are undoubtedly more susceptible than young men to the lures of persons who want to take sexual advantage of them. Likewise, in this society, the bad reputation and illegitimate child which can result from an improvident sexual liaison may be far more ruinous to a young woman's psychological health than similar conduct is to a young man's. But the Equal Rights Amendment forbids finding legislative justification in the sexual double standard, and requires such statutes to be framed in terms of the general human need for protection rather than in terms of crude sexual categories.

Second, traditional laws protecting all women of a particular age or status against sexual assault are "overinclusive" to the extent that they punish sexual activity when unwanted penetration of the vagina is not involved. It might be argued that statutory rape laws and other laws which render a woman's consent inoperative should be sustained on the same theory that forcible rape laws are upheld: that the legislature wished to give special protection to young women's genital organs.[214] However, it is unlikely that such claims could withstand close court scrutiny under the unique physical characteristics tests. In particular, a court would be unable to find a close correlation between the activity being regulated (consensual sexual intercourse) and the justifying physical basis (susceptibility of the vagina to unwanted penetration).[215]

male juveniles equal protection under the laws." Washington Post, Jan. 2, 1971, at 3, col. 2. The Royal Commission on the Status of Women in Canada has reached a similar conclusion. Its recent Report recommended "that the Criminal Code be amended to extend protection from sexual abuse to all young people, male and female, and protection to everyone from sexual exploitation either by false representation, use of force, threat, or the abuse of authority." REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA ch. 9, par. 42, at 374 (1970).

[214] It is true that statutory rape may involve breaking the hymen, but very few states consider the victim's chastity material to the question of guilt. Moreover, statistical reports show that few statuory rape complainants are virgins. See Schiff, *Statistical Features of Rape*, 14 J. FOR. SCI. 102 (1969).

[215] The law in most states presumes that a sixteen year old girl can consent to marriage (with her parents' approval), and, by implication, to sexual relations, while an unmarried girl of sixteen is legally presumed to be incapable of giving consent to a single act of sexual intercourse. However, there are no physical differences between the sexual acts involved. As discussed at pp. 958-59 *supra*, the minimum marriage age is not based on a unique physical characteristic of women. Therefore, the statutory rape law, which also deals with consensual sexual relations, cannot be justified as based on such a unique characteristic. There are, of course, social and psychological differences between marital and extramarital sexual relations, and the state may recognize them through sex-neutral legislation about extramarital sexual intercourse involving either young men or young women.

Even if it found noncoerced sexual intercourse rarely physically harmful to post-pubescent girls, a court might find that sexual intercourse is physically dangerous to girls who have not reached puberty. Upon finding such a fact situation, the court would conclude that the class of women victims is defined too broadly. If it made such a determination, a court could limit the operation of the statutory rape laws to pre-pubescent children. In the alternative, the court could strike down the law altogether because of its overbreadth and because it fails to base its sex difference upon a unique physical characteristic of women.

If invalidated, some of the laws, such as the seduction laws, which derive from outdated standards of courting and morality, would probably not be resuscitated. Upon reexamination, legislatures might decide that the existing kidnap laws or other unlawful restraint laws already penalize any serious offensive deception or decoying, and that further penalties would be duplicative. Legislatures would be free, however, to extend the laws against sexual coercion to protect men as well as women. This is particularly likely where sexual relations with pre-adolescent children are involved.[216]

A slightly different problem is raised in states which set penalties for sexual activities initiated by women, as well as by men, but where different laws, standards of guilt, and penalties apply depending on whether the actor is a woman or a man. Michigan, for example, prohibits women from engaging in sexual intercourse with boys younger than fifteen.[217] But the law requires that the defendant actually knew the boy was under fifteen (the statutory rape law does not require actual knowledge of the girl's age), and the penalty is a maximum of five years, as compared with the lifetime maximum for statutory rape.[218] Aside from the forcible rape laws, whose special coverage can be justified on the basis of physical characteristics unique to men and women, the Equal Rights Amendment would require sexual assault laws to provide equal standards of guilt and penalties for men and women offenders.[219]

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[216] Some states already have laws that protect all children, regardless of sex. For example, Illinois has merged its statutory rape law into laws prohibiting indecent liberties with any child or contributing to any child's sexual delinquency. ILL. ANN. STAT. ch. 38, § 11-4 (Smith-Hurd Supp. 1971) and ch. 38, § 11-5 (Smith-Hurd 1964).

[217] MICH. COMP. LAWS ANN. § 750.339 (1968).

[218] *Compare* MICH. COMP. LAWS ANN. § 750.339 *with* § 750.520 (1968).

[219] Where a state has mirror-image statutes which penalize men and women for the same conduct, by the same standards, and with the same penalties, the laws could be upheld under the Equal Rights Amendment. For example, Michigan's identical laws prohibiting acts of "gross indecency" between two men and between two women would

Considering the variety of laws regulating nonconsensual sexual activity, ranging from rape to sexual contact, it is surprising to realize that all of them can be reduced to a few basic elements: the touching of or with genitals, by means of force or deception, and, in the case of young people, the touching of genitals by an older person. The current sexual offense laws are highly duplicative, both of one another, and of general penal laws against kidnap, assault, and battery. The great degree of overlap in these laws, as well as the many distinctions without differences, provide a fertile field for confusion; they also encourage overcharging and extreme penalties. Moreover, the particular situations with which many of the laws deal evoke strongly emotional reactions and foster legislative mandates of higher penalties than the actual act usually merits. For instance, rape is singled out from other sexual offenses and classified with murder for the purposes of sentencing. This classification helps neither the accused[220] nor the victim.[221] Moreover, it tends to reduce the seriousness of other forms of sexual assault besides actual intercourse, which may well be equally disturbing for the victim.

The Model Penal Code has undertaken to bring together the confusing disparity of sexual offenses into a few categories structured in terms of the nature of the act, the vulnerability of the victim, and the coerciveness of the situation.[222] The Equal Rights Amendment would require legislatures in all states to reformulate at least some

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not have to be invalidated; a court would not require the formality of rewriting a statute such as this, where, in effect, it already covers men and women alike. *See* MICH. COMP. LAWS ANN. §§ 750.338, 750.338(a) (1968).

[220] The Fourth Circuit recently held that Maryland's death penalty for rape was so excessively disproportionate as to violate the Eighth Amendment's guarantee against cruel and unusual punishment. Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970).

[221] Between 1960 and 1967 the number of forcible rapes known to law enforcement officials increased 61 per cent. In contrast, the proportion of forcible rapes solved by arrest of the offender decreased annually between 1965 and 1967. UNIFORM CRIME REPORTS, *supra* note 201, at 12-13.

In conjunction with the severe penalties for forcible rape, the defense of consent has developed. The existence of the consent defense (which is unique to rape) has the effect of putting the complainant on trial, for she will usually be subjected to a relentless defense examination, in an attempt to impugn her character and suggest that she actually consented to sexual attack. The consent defense and corresponding trial tactics thus have the effect of deterring women from making complaints about rape attacks; the Federal Bureau of Investigation estimates that forcible rape "is probably the most underreported crime by victims to police." UNIFORM CRIME REPORTS, *supra* note 201, at 13. As a result, some women's rights advocates have argued that women would actually be better protected if rape were prosecuted simply as aggravated assault.

[222] MODEL PENAL CODE §§ 213.0-.06 (Proposed Official Draft, 1962). For instance, the Model Penal Code's crime of "sexual assault" prohibits offensive "touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying sexual desire of either party." MODEL PENAL CODE § 213.4 (Proposed Official Draft, 1962).

of their laws. While legislatures could very simply bring the laws into line with the Amendment by substituting the word "person" every time the words "female," "male," "man" or "woman" appear, hopefully they would be encouraged to re-evaluate, rationalize, and simplify this crazy-quilt area of criminal law.

2. *Consensual Sexual Relations*

Criminal laws in every state penalize some sexual liaisons, even though both partners are fully responsible for their conduct and engage in the acts voluntarily and privately. As with nonconsensual sexual conduct, legislatures have frequently linked the definition of these crimes to the sex of one or both partners.

Statutes prohibiting sodomy generally sweep in alike men and women, married and unmarried persons, heterosexuals and homosexuals.[223] As a result, most of these statutes would not violate the Equal Rights Amendment, prohibiting as they do certain acts regardless of the identity of the actor or the circumstances of the act. A few states, however, limit liability under their sodomy statutes to males.[224] Like rape, the definition of sodomy can be limited to penetration by the penis. Where sodomy is defined in this way, such that females are incapable of committing it, laws restricted to males may be sustained under the Equal Rights Amendment. However, a statute which defined sodomy more broadly, to include all oral-genital contact, would violate the Amendment if it were restricted to males.

A few adultery laws also contain sex discriminatory provisions which would be impermissible under the Equal Rights Amendment. Roman law defined adultery as sexual intercourse with another man's wife.[225] Some states reflect this one-sided view by failing to define intercourse between a married man and a single woman as adultery.[226] In Massachusetts and Oregon, an unmarried woman cannot be punished for relations with a married man, although an unmarried man is criminally liable if he participates in an adulterous relationship with a married woman.[227] Discrepancies like these in the liability of men and women derive from social attitudes toward the relative offensiveness of extramarital activity by men and by women. The singling out of married women's extramarital activity harks back to concepts of a married woman as the property of her husband, although common law justifications focused on the fact that a married woman's liaison might produce offspring who would have her husband's name and whom her husband would have the duty to support.[228] However, the core idea in adultery is that extramarital intercourse per se threatens the marriage relationship. If this is the case, a court could not permit a state to set stricter penalties for a woman's extramarital activity than for a man's.

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[223] "Sodomy" is used here, as it is used in many statutes, to include both oral-genital contact and anal intercourse. In some states it also includes mutual masturbation, sexual relations with animals, and sexual contact with dead bodies.

[224] *See, e.g.*, 81 C.J.S. *Sodomy* § 1 (1955).

[225] M. Ploscowe, Sex and the Law 146 (1951).

[226] In Indiana, adultery is defined as intercourse between a man and a married woman, while intercourse with an unmarried woman is defined as the lesser offense of fornication. Warner v. State, 202 Ind. 479, 175 N.E. 661 (1931). A similar discrepancy is apparent in the "unwritten law defense," which survives in some states for men. The unwritten law defense permits a man to argue in complete defense to a homicide prosecution that the man he killed was, at the time of the homicide, in the act of sexual intercourse with his wife; it is, in other words, a license to men to murder in the face of adultery. No state gives women who kill their husbands' lovers a corresponding defense. Tex. Penal Code, Art. 1220 (Vernon's 1961); N.M. Stat. Ann. § 40A-2-4 (1953); Utah Code Ann. § 76-30-9(4) (1953).

Following the rule of narrow construction of criminal statutes, courts will most likely invalidate sodomy or adultery laws that contain sex discriminatory provisions, instead of solving the constitutional problems by extending them to cover men and women alike.[229] This is especially likely since statutes regulating consensual sexual activity are also open to attack under the constitutional right to privacy in intimate sexual matters.[230] However, a legislature intent on retaining criminal penalties for sodomous or adulterous conduct could easily bring the laws into line with the Equal Rights Amendment by extending them to apply equally to men and women.

3. *Prostitution*

At common law and still today in most parts of the United States, prostitution is, by definition, a crime committed only by women.[231] Even statutes neutral on their face turn out to be enforced only against women offenders.[232] Prostitution laws have been the focus of much heated controversy about the proper role of law in regulating moral or sexual behavior, and many people believe prostitution should not be criminalized at all.[233] But more narrowly, prostitution laws have been attacked as discriminating against women. Two kinds of sex bias are written into the majority of prostitution laws: first, women who sell access to their own sexual conduct are penalized, whereas men who do the same thing are not; and, second, the prostitute, who under current psychosocial conditions is usually a woman, is penalized, whereas the patron, who is usually a man, is not.[234]

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[227] Both married men and married women are liable for extramarital sexual intercourse. ORE. REV. STAT. § 167.010 (1969); MASS. GEN. LAWS, ch. 272 § 14 (1932).

[228] R. PERKINS, CRIMINAL LAW 377 (2d ed. 1969).

[229] *Cf.* Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970) in which a federal court invalidated Texas's entire sodomy law because of its overbreadth in extending to acts between husband and wife. The decision was vacated by the United States Supreme Court *sub nom.* Buchanan v. Wade, 91 S. Ct. 1222 (1971), and remanded for consideration in the light of Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971).

[230] *See* Griswold v. Connecticut, 381 U.S. 479 (1965). At least two states have already repealed their laws against consensual homosexual relations. *See* ILL. ANN. STAT. ch. 38, §§ 11-2, 11-3 (Smith-Hurd 1964); CONN. GEN. STAT. REV. §§ 53a-65, -75 to -77 (Supp. 1969) (effective Oct. 1, 1971).

[231] *See* "Prostitution," BLACK'S LAW DICTIONARY 1386 (4th ed. 1951); 73 C.J.S. *Prostitution*, § 1 (1951); Eisner v. Commonwealth, 375 S.W.2d 825, 827 (Ky. 1964). *But cf.* D.C. CODE ENCYCL. ANN. § 22-2701 (1967). At least one state still imposes special punishment on young women who are considered "in manifest danger of falling into habits of vice." No corresponding provisions are made for young men. *See* CONN. GEN. STAT. ANN. §§ 17-

Courts may be expected to hold that laws which confine liability for prostitution to women only are invalid under the Equal Rights Amendment. There is no unique physical characteristic of women which would justify outlawing prostitution when it is done by women, and not when it is done by men. Earlier beliefs that women are the carriers of venereal disease because of their sex have no scientific basis. Ideas that women who sell access to their bodies are social problems, whereas men who do the same thing are not, derive their only rationality from a social double standard which may not enter into legislative or judicial determinations under the Equal Rights Amendment. Even in the absence of the Equal Rights Amendment, recent reforms of prostitution laws have extended the coverage to men. Thus, the Model Penal Code refers to a person guilty of prostitution as "he or she."[235] The New York Penal Code contains a section explicitly stating that both men and women may be guilty of prostitution.[236] With the impetus of the Equal Rights Amendment, other state legislatures can be expected to move in this direction.

If prostitution laws were redefined to cover male prostitutes, then the courts would be unlikely to find a per se violation of the Equal Rights Amendment in the fact that prostitution laws penalize the

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379, 18-65. Connecticut's statutes survived constitutional attack in State v. Mattiello, 4 Conn. Cir. 55, 225 A.2d 507 (1967), *appeal dismissed*, 395 U.S. 209 (1969).

[232] S. Harmon, Attitudes Toward Women in The Criminal Law Process 5 (1970) (unpublished paper on file at Yale Law School Library.)

[233] *Compare* A. FLEXNER, PROSTITUTION IN EUROPE (especially at 11-14) (1914), *with* REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION [The Wolfenden Report] (1957). If the newly articulated constitutional right to privacy receives expanded interpretation, *see* discussion in Part III(D) at p. 900 *supra*, all regulation of prostitution, other than public health measures, may be ruled unconstitutional.

[234] Men may be punished as entrepreneurs for trafficking in women or keeping a house of ill fame. They are seldom prosecuted for mere patronage of a prostitute. KANOWITZ, *supra* note 2, at 16-17.

[235] MODEL PENAL CODE § 251.2 (Proposed Official Draft, 1962).

[236] N.Y. PENAL LAW § 230.10 (McKinney 1967).

"seller" but not the "buyer." In general, regulating the conduct of the seller and not the buyer is a rational governmental choice, although in the case of prostitution such a choice may not make sense, even in terms of effective deterrence.[237] Nevertheless, prostitution laws which penalize only the seller would be subject to judicial scrutiny as classifications which fall more heavily on one sex than the other.[238] Thus, to sustain its laws, a state would bear a heavy burden of demonstrating the rationality of regulating only the seller and not the buyer in a prostitution transaction. Reformed penal laws have already begun to regulate patrons as well as prostitutes.[239] It is likely, and desirable, that legislatures, in removing the sex bias from their laws, will follow this lead.

Just as the Equal Rights Amendment would invalidate prostitution laws which apply to women only, so it would require invalidation of laws specially designed to protect women from being forced into prostitution. In addition to many state laws of this type, the federal White Slave Traffic Act (Mann Act) prohibits the transportation in interstate commerce of

> any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral purpose.[240]

Related sections of the Act also prohibit persuading, inducing, enticing, or coercing a woman to travel in interstate commerce for the above purposes.[241] Cases interpreting the Mann Act have held that a woman may be found guilty as a principal under the Act; in some circumstances she may even be convicted of agreeing to transport herself in interstate commerce.[242] However, it is no crime to transport a man or boy in interstate commerce for the purposes set forth in the statute. Congress could easily bring the Mann Act into conformity with the Equal Rights Amendment by substituting the word "person" for the words "woman or girl" in the statute.

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[237] The recidivism rate for prostitution is so high that prostitution has been called "life on the installment plan." Lukas, *City Revising its Prostitution Controls*, N.Y. Times, Aug. 14, 1967, at 1, col. 2. Compare the Soviet Union's success at deterring prostitution by posting publicly the names, addresses and places of employment of the customers of prostitutes. KANOWITZ, *supra* note 2, at 17.

[238] In its published statistics, the Federal Bureau of Investigation classifies "commercialized vice" together with prostitution. Even so, 30,866 women were arrested for prostitution or commercialized vice as compared with 8,878 men. This figure is particularly striking in light of the fact that the total number of men arrested in 1967 was seven times greater than the total number of women arrested. UNIFORM CRIME REPORTS, *supra* note 201, at 124.

[239] *See* N.Y. PENAL LAW § 230.05 (McKinney 1967); CONN. GEN. STAT. ANN. PENAL CODE § 84, 1969 Public Act No. 828 (effective Oct. 1, 1971). However, New York's law penalizing the patrons of prostitutes has only rarely been enforced. Speech by Elizabeth Schneider, Yale Law School, April 29, 1971.

[240] 18 U.S.C. § 2421 (1964).

[241] 18 U.S.C. §§ 2422-23 (1964).

As prostitution laws are redefined to cover male as well as female prostitutes, a court faced with a challenge to the Mann Act might also be inclined simply to extend this law to apply to the transportation of men for illicit purposes. Under current conditions, such an extension would not subject a large number of additional people to criminal liability. However, this would disregard the legislative history and body of court decisions interpreting Congressional intent, which have placed great emphasis on the weakness of women. As late as 1960, the Supreme Court declared:

> 'A primary purpose of the Mann Act was to protect women who are weak from men who are bad.' *Denning v. United States*, 247 F. 463, 465. It was in response to shocking revelations of subjugation of women too weak to resist that Congress acted. See H.R. Rep. No. 47, 61st Cong., 2d Sess., pp. 10-11. As the legislative history discloses, the Act reflects the supposition that the women with whom it sought to deal often had no independent will of their own, and embodies, in effect, the view that they must be protected against themselves.[243]

Given this background, a court might feel that extending the law to cover men would be expanding criminal liability further than Congress intended. Here, as with other criminal laws, a court would probably resolve doubts about congressional intent by striking down the law.

4. *Indeterminate Sentencing*

In addition to separate substantive law for men and women, some states have special sentencing provisions for women. These laws in effect require or permit judges to place women in a separate correctional status in which the lengths of their sentences are determined not by the judge but by correctional authorities within the limits set by statute. When women are placed in such a status, they may be subjected to longer sentences than those provided for in the substantive statute, thereby creating higher maximum penalties for women than for men convicted of the same crime.

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[242] United States v. Holte, 236 U.S. 140 (1915); *but cf.* Gebardi v. United States, 287 U.S. 112 (1932).

[243] Wyatt v. United States, 362 U.S. 525, 530 (1960).

In *United States* ex rel. *Robinson v. York*[244] and *Commonwealth v. Daniel*,[245] two indeterminate sentencing laws were successfully attacked under the Fourteenth Amendment as denying women equal protection of the laws.[246] However, similar laws remain on the books in a number of states.[247] Such laws, if not invalidated under the Fourteenth Amendment, would be invalidated under the Equal Rights Amendment. In general, the special laws for sentencing of women are in the form of separate additional sentencing statutes. Thus, if a court invalidated the special law for women, it would simply leave women subject to the standard sentencing laws. This was the result in *Robinson* and *Daniel.*

5. *Summary*

Courts faced with criminal laws which do not apply equally to men and women would be likely to invalidate the laws rather than extending or rewriting them to apply to women and men alike. As a result, legislatures would need to devote attention to revising their penal laws in order to bring them into conformity with the Equal Rights Amendment. While necessary, this should not be an unduly burdensome requirement. Proposals for reform, like the Model Penal Code, already provide models for many new laws that would eliminate impermissible sex discrimination.[248] States such as New York, Connecticut, and Illinois, which have already reformed their criminal laws, would need to make only a few changes to bring them into line with the Equal Rights Amendment. Other states, whose laws regulating sex offenses are holdovers from Victorian or even Puritan times, may wish to revise their sex discriminatory criminal statutes as part of a broader modernization effort.

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[244] 281 F. Supp. 8 (D. Conn. 1968).

[245] 430 Pa. 642, 243 A.2d 400 (1968).

[246] In *Robinson*, the court ordered the petitioner released because she had already served the statutory maximum sentence for breach of the peace and resisting arrest. The court stated that to hold her for the full three years permitted under the sentencing law for women offenders would have denied her the equal protection of the laws. In *Daniel*, appellants' cases were sent back for resentencing because the court held that Pennsylvania's law requiring judges to impose the statutory maximum on all women sentenced to the State Correctional Institution at Muncy violated the Equal Protection Clause.

[247] *E.g.*, Me. Rev. Stat. Ann., tit. 34, § 802 (men); §§ 853-54 (women) (Supp. 1970). Disparities also exist in the juvenile laws of several states. For instance, in New York a court can order incorrigible, ungovernable, or habitually disobedient women to be held in custody until they are 20, if they are adjudged "persons in need of supervision" (PINS); whereas, boys can be held under the PINS statute only until age 18. Since most of the commitments under the PINS law stem from activity which could not result in criminal conviction, the law imposes on women two years of extra liability for noncriminal activity. N.Y. Family Court Act, §§ 712, 756 (McKinney 1963).

[248] A few sections of the Model Penal Code are sex biased, and would be invalid under the Equal Rights Amendment; *see, e.g.*, Model Penal Code § 213.3(1)(d) (seduction).

D. *The Military*

The Armed Forces have always been one of the most male-dominated institutions in our society. Only men are subject to involuntary conscription. Various regulations of the Armed Forces restrict the access of women to the military, and indeed place an absolute limit on the number permitted to serve. Women with dependent children may not enlist, while men in the same situation may do so. Certain grounds for discharge apply only to women. Numerous other forms of differential treatment pervade the military services.

It is not difficult to explain why the military is structured in this way. In the past, physical strength was essential to military success. Weapons were heavy, long marches on foot were frequent, and hand to hand fighting was common. Women were considered in most respects to be weaker than men. Women were also handicapped by pregnancy. Lack of effective contraceptive methods meant that they were frequently, if not constantly pregnant, and disease and death were not uncommon accompaniments to childbirth. Men were therefore a more reliable and mobile group. Sociological factors reinforced this "division of labor." Women were considered too delicate to be exposed to battle and its attendant pain and discomfort. They were trained to be passive, dependent and without initiative. For men, on the other hand, armed struggle was seen as a catalyst of maturity, a symbol of aggressive masculinity, a test which would "separate the men from the boys."[249] Women who wished to fight had to disguise themselves as men.

In this country women have served in the Armed Forces with full military status only since World War II, when the need for personnel and the existence of many civilian-type jobs in the military made the utilization of women appear feasible to the Armed Forces. A Women's Auxiliary Army Corps with civilian status was created in 1942. It proved administratively unworkable, and in 1943 the Army took women under its direct command.[250] After World War II, Congress decided to keep the women's arm of the services at reduced size. The Women's Army Corps is now permitted to total only two per cent of the full strength of the services.[251]

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[249] *See, e.g.* E. HEMINGWAY, A FAREWELL TO ARMS (1929); FOR WHOM THE BELL TOLLS (1940); N. MAILER, THE NAKED AND THE DEAD (1948); WHY ARE WE IN VIETNAM? (1967).

[250] For a history of the creation of the Women's Army Corps (WAC) and its activities in World War II, see M. TREADWELL, U.S. ARMY IN WORLD WAR II: SPECIAL STUDIES: THE WOMEN'S ARMY CORPS (1954).

While many people look upon such restrictions on women's military service as relieving them of an unadulterated burden or evil, others feel that it would be advantageous for women to receive the training and benefits that accompany military service in this country. No one can doubt that military service has tremendous disadvantages, chief among them the danger of loss of life and the requirement of learning to kill others. Yet there are also benefits afforded the individuals who serve. The Armed Forces furnish in-service vocational and specialist training, medical care, and benefits for dependents. Veterans receive educational scholarships and loans, preference in government employment, pensions, insurance, and medical treatment.[252]

More subtle factors involve the effect of military service on one's self-image and on the way he or she is viewed by others. For large segments of the population, service is taken to prove that an individual has sacrificed for his or her country. He or she deserves to be taken seriously in return. As Professor Norman Dorsen has said:

> [W]hen women are excluded from the draft—the most serious and onerous duty of citizenship—their status is generally reduced. The social stereotype is that women should be less concerned with the affairs of the world than men. Our political choices and our political debate often reflect a belief that men who have fought for their country have a special qualification or right to wield political power and make political decisions. Women are in no position to meet this qualification.[253]

Having served or being liable to serve also tends to make an individual sensitive to and concerned about the country's foreign policy. Those who must carry out the decisions made in the upper echelons of the government will be interested in participating in the political process and trying to prevent the formulation of policies which involve unjustified killing and destruction, and unnecessary risk of injury and death.[254]

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[251] 10 U.S.C. § 3209, which limited the authorized strength of the WAC to 2% of the authorized strength of the Regular Army, was amended in November, 1967, to permit the Secretary of Defense to determine the limit. 10 U.S.C. § 3209(b) (Supp. IV, 1967). The 2% maximum is maintained by regulation, 32 C.F.R. § 586 (1971).

[252] On veterans' benefits generally, see 38 U.S.C. §§ 1 to end (1964) *as amended in part* (Supp. V, 1969); 50 U.S.C. App. § 459 (Supp. V, 1969); 38 C.F.R. (1970). 38 U.S.C. §§ 310-58, 410-23, and 501-62 deal with pensions; 38 U.S.C. §§ 601-44, with hospitalization and provision of medical services; 38 U.S.C. §§ 701-88, with insurance; and 38 U.S.C. §§ 1601-1791, with educational benefits for veterans and their families. Preference in federal governmental employment is governed by 5 U.S.C. §§ 2106, 3306, 3309-17, 3351, 3363, 7501, 7511-12 (Supp. V, 1969).

[253] *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. On the Judiciary*, 91st Cong., 2d Sess. 320 (1970).

Under the present system few women enter the military and receive these benefits and lessons. Partly as a result, the social stigma and ridicule evoked by the idea of a woman in the military persist. Until women are required to serve in substantial numbers, stereotypes about their inability to do so will be perpetuated.

The Equal Rights Amendment will have a substantial and pervasive impact upon military practices and institutions. As now formulated, the Amendment permits no exceptions for the military.[255] Neither the right to privacy nor any unique physical characteristic justifies different treatment of the sexes with respect to voluntary or involuntary service, and pregnancy justifies only slightly different conditions of service for women. Such obvious differential treatment for women as exemption from the draft, exclusion from the service academies, and more restrictive standards for enlistment[256] will have to be brought into conformity with the Amendment's basic prohibition of sex discrimination.

These changes will require a radical restructuring of the military's view of women, which until now has been a narrow and stereotypical one. Until recently, only unmarried women were generally allowed to serve, and when married women were permitted, their dependents received none of the benefits that men's families receive. A woman was presumed to be the second worker in her family rather than the one responsible for its support, and benefits were therefore assumed to be unnecessary. Any woman who became pregnant or adopted a child was discharged. Women, being excluded from many benefits, were thus a particularly economical source of labor. These rules also effectively prevented women from rising in the ranks and becoming officers, for they would have to be willing to forego marriage and children in order to do so. They were therefore denied the exercise of leadership skills and were viewed as inferior, deserving the subordinate tasks to which the military's discriminatory rules consigned them. Women were also seen as less flexible and less valuable workers than men, incapable of serving in many positions. They were assigned to "women's work" as clerks and secretaries, nurses, or technicians. Many interested in training in fields such as photography were denied access to the programs.[257]

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[254] *See, e.g.*, the account of the protest marches of the Vietnam Veterans Against the War, N.Y. Times, April 25, 1971, § 4, at 1, col. [illegible]; the discussions of anti-war organizing in the Armed Forces by Gabriel Kolko in The Liberated Guardian, April 15, 1971, at 10, col. 3; and in A. STAPP, UP AGAINST THE BRASS (19[illegible]).

[255] Although this is true of the Amendment under the theory and form proposed here, in Congress the resolution has often been amended to exempt the draft from its coverage. In 1950 and 1953, the Equal Rights Amendment was passed by the Senate only after it was altered to permit laws which made reasonable classifications to protect women. This phrase was intended to include the draft as one such law. In 1970, Senator Ervin proposed an amendment to the resolution, which was accepted by the Senate, specifically exempting women from the draft. See the discussion at pp. 886-88 *supra*. And in July, 1971, the House Judiciary Committee reported out the Equal Rights Amendment with a similar amendment.

[256] On the draft, *see* 50 U.S.C. App. §§ 453, 454(a) (Supp. V, 1969); on the service academies, *see Hearings on S.J. Res. 61 Before a Subcomm. of the Senate Comm. on the Judiciary* 574 (1970). Cases upholding the exclusion of women from state military schools include Allred v. Heaton, 336 S.W.2d 251 (Tex.), *cert denied*, 364 U.S. 517 (1960); Heaton v. Bristol, 317 S.W.2d 86 (Tex. 1958), *cert. denied*, 359 U.S. 230 (1959). 32 C.F.R. §§ 888.4 (1970), 580 (1971) set out differential enlistment standards.

This view of women has begun to change. But it is happening slowly in some services and not at all in others. The Equal Rights Amendment will greatly hasten this process and will require the military to see women as it sees men—as a diverse group of individuals, married and unmarried, with and without children, possessing or desiring to acquire many different skills, and performing many varied kinds of jobs. The impact of the Amendment will now be examined in detail with regard to four important areas: the draft, grounds for discharge, assignment and training, and in-service conditions.

1. *The Draft*

The Military Selective Service Act of 1967 governs the conscription of citizens into the Armed Forces.[258] The Act explicitly applies only to men in requiring registration and induction for training and service in the Army, Navy, Marines, Coast Guard, and Air Force.[259] Men have several times challenged the Act, claiming that it violates constitutional rights of due process and equal protection by discriminating on the basis of sex. The courts have consistently rejected this contention.[260]

Under the Equal Rights Amendment the draft law will not be invalidated. Recognizing the concern of Congress with maintaining the Armed Forces, courts would construe the Amendment to excuse the word "male" from the two main sections of the Act, dealing with registration and induction, thereby subjecting all citizens to these duties. A woman will register for the draft at the age of eighteen, as a man now does. She will then be classified as to availability for induction and training. If she meets the physical and mental standards, and is not eligible for any exemptions or deferments, she will join men in susceptibility to induction. The statute declares that no one may be inducted until shelter, water, heating and lighting, and medical care are available.[281] The military will clearly have sufficient time during the period after ratification to make the minor adaptations, such as the expansion of gynecological services, necessary to comply with the statute. This is particularly true since the eligibility of women will not necessarily entail an increase in the number of persons inducted.

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[257] For complaints about such treatment, see, for example, The Bond: The Voice of the American Servicemen's Union, April 19, 1971, at 8, col. 1.

[258] 50 U.S.C. App. §§ 451 *et seq.* (Supp. V, 1969).

[259] 50 U.S.C. App. §§ 453, 454 (Supp. V, 1969).

[260] *See, e.g.*, United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970); United States v. Clinton, 310 F. Supp. 333 (E.D La. 1970); United States v. St. Clair, 291 F. Supp. 122 (S.D.N.Y. 1968).

The Secretary of Defense has the power to set the standards of physical and mental fitness which all inductees must meet.[282] A general intelligence test is used to determine mental qualification, and a physical examination is given to check the general state of health of the individual.[283] Under the Equal Rights Amendment, all the standards applied through these tests will have to be neutral as between the sexes. Moreover, even after the mental and physical standards have been made uniform for both sexes, they will have to be scrutinized carefully to assure that they are related to the appropriate jobs and functions and do not operate so as to disqualify more women than men. Such a result would raise the possibility that the test, though neutral on its face, was in fact being used to discriminate against women.[284] Achieving this goal of uniform, nondiscriminatory standards will require some changes.

First, height standards will have to be revised from the dual system which now exists. At present, men from 5′0″ to 6′8″ tall are permitted to serve as enlisted personnel in the Army and Air Force; the range in the Navy and Marine Corps is from 5′0″ to 6′6″. For male officers, the range of permissible height is from 5′0″ to 6′8″ in all services except the Army, where the minimum is 5′6″. Women in all services and in all ranks may be from 4′10″ to 6′0″ tall.[265] Under the Equal Rights Amendment, the same minimum and maximum will have to be applied to both sexes. Persons, male and female, up to 6′8″ (or 6′6″) would be accepted, if these remain the maximum limits. For enlisted personnel, the services could retain their current minimum for men of 5′0″ as the uniform standard, or adopt the lower 4′10″ minimum for both sexes. But if the Army retains its 5′6″ minimum for officers, it would effectively exclude many women, and the minimum would therefore have to be shown to be closely job-related in order to stand.[266]

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[281] 50 U.S.C. App. § 454(a) (1964).

[282] *Id.*

[283] *See* Medical Fitness Standards for Appointment, Enlistment, and Induction. C 15, AR 40-501 *et seq.*, reprinted in SSLR 2201.

[284] *See* the discussion at p. 899 *supra*, concerning criteria to be applied in reviewing functional classifications. Under Title VII of the 1964 Civil Rights Act, physical and mental tests with regard to employment have come under scrutiny as a possibly discriminatory device. The Equal Employment Opportunity Commission and the courts have held that such tests must be validated or proved to be closely job-related before they can be used, if they fall more heavily on a protected group of applicants or employees. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). *See also* the discussion in *Developments—Title VII*, *supra* note 45, at 1120-40.

The height-weight correlations for the sexes will also have to be modified.[267] At most heights there is a large area of overlap between the normal weight for men and women. For persons above or below this range, an evaluation based on the health of the individual will be made. Since every inductee receives a comprehensive physical examination, this will entail little extra burden.

The same principles will have to be applied to the intelligence test. At present men and women take different tests for enlistment;[268] under the Amendment, both will take the same test. Similarly, the required minimum score will be the same for both sexes. If the test currently used for men is administered to women, and it is shown that women on the whole score lower on it, it will have to be demonstrated that the questions do test general intelligence and are not taken solely from areas of factual knowledge with which most men and few women in this society are trained to be familiar.

Most of the deferments and exemptions from military service could easily be adapted to a sex-neutral system. Women ministers, conscientious objectors, and state legislators will be treated as the men in those categories now are. Women doctors and dentists will be subject to call under the conditions governing medical and dental specialists. However, some provisions will have to be extended or stricken. The dependency deferment now provides that "persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable" may be deferred.[269] It also states that the President may provide for the deferment of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. This has been interpreted to mean that a married person with a child will generally be deferred.[270]

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[265] Medical Fitness Standards, *supra* note 263, C 25, AR 40-501, 2-21, reprinted in SSLR 2209.

[266] *Cf.* New York State Division of Human Rights v. New York-Pennsylvania Professional Baseball League, 320 N.Y.S.2d 788 (Sup. Ct. App. Div. 1971), holding that high minimum height and weight requirements for professional baseball umpires unjustifiably excluded women in violation of state and federal law.

[267] Medical Fitness Standards, *supra* note 263, C 25, AR 40-501, 2-22 & App. III, Tables I & II, reprinted in part in SSLR 2209, 2222.

[268] 32 C.F.R. § 888.2(f) (1970).

There are several permissible alternatives to these deferment provisions under the Equal Rights Amendment. Deferment might be extended to women, so that neither parent in a family with children would be drafted. Alternatively, the section could provide that one, but not both, of the parents would be deferred. For example, whichever parent was called first might be eligible for service; the remaining parent, male or female, would be deferred. A third possibility would be to grant a deferment to the individual in the couple who is responsible for child care. The couple could decide which one was going to perform this function, and the other member would be liable for service. In a one-parent household Congress would probably defer the parent.

Each of these alternatives carries very different and significant policy implications for family structure and population growth. Given current draft calls, and the belief that having both parents present is beneficial for the children, it is likely that both parents will be deferred. However, Congress can choose any of the above policies, for they do not discriminate between men and women.

The Selective Service Act exempts from the draft the sole surviving son of a family which has lost a member, male or female, in the service of the country.[271] Under the Equal Rights Amendment this exemption for men only cannot stand, for it will mean drafting women when men in identical circumstances are excused. The reasons for the exemption are twofold. One is the feeling that once a family has lost a member, or several members, it cannot be asked to bear a final loss. The other concern is that the family name and line be preserved. The second reason for the exemption will no longer be permissible, because it results in discrimination against women. But the first reason does justify extending the exemption to women, for the purpose is to spare a family its last child subject to induction. Thus the sole surviving child will be exempt.

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[269] 50 U.S.C. App. § 456(h)(2) (Supp. V, 1969).

[270] United States v. Brunier, 293 F. Supp. 666 (D. Ore. 1968).

[271] 50 U.S.C. App. § 456(o) (1964). This provision exempts the sole surviving sons of families "where the father or one or more sons or daughters . . . were killed in action or died in the line of duty. . . ." Under the Equal Rights Amendment, the law will have to be extended to cover all female family members lost in military service.

The computation of the draft quota for a given area is based on the actual number of men in the area liable for training but not deferred after classification.[272] When the Equal Rights Amendment becomes operative the number of women available will be included in the pool of available registrants.

The Selective Service Act provides for the administration of the draft system by local and appeal draft boards.[273] The Act explicitly states that no citizen shall be denied membership on any board on account of sex.[274] However, women are now only a small percentage of total draft board membership. Black registrants have challenged their induction on similar facts, claiming that they cannot be legally inducted by a board which is disproportionately white or which has no black members. None of these claims has met with success.[275] The chances that women will be excused from induction because of the sexual imbalance on the boards is therefore small. Adoption of the Equal Rights Amendment, however, will undoubtedly stimulate the appointment of greater numbers of women to draft boards.

It is possible that an all volunteer army will be established in the United States in the foreseeable future. In that event, equalization of the draft becomes of academic interest only. Even if the volunteer system were approved, however, the draft would probably remain in effect for some years. More important, under either system of recruitment the Equal Rights Amendment will require a change in the status of women in the military and the conditions under which they serve.

2. *Grounds for Discharge*

In addition to the grounds for discharge applicable to both sexes, several grounds apply only to women. One such rule requires that a married or unmarried woman who becomes pregnant must be discharged. Another requires that a woman with dependent children cannot serve.[276] Men, married or single, who father children or have dependent children are not discharged for such reasons.

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[272] 50 U.S.C. App. § 455(b) (1964).

[273] 50 U.S.C. App. § 460(b)(3) (Supp. V, 1969).

[274] *Id.*

[275] *See, e.g.*, United States v. Brooks, 415 F.2d 502 (6th Cir. 1969), *cert. denied*, 397 U.S. 969 (1969); Simmons v. United States, 406 F.2d 456 (5th Cir. 1969), *cert. denied*, 395 U.S. 982, *rehearing denied*, 396 U.S. 871 (1969); Clay v. United States, 397 F.2d 901 (5th Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1968).

Several women have recently brought suits challenging these and similar military regulations on equal protection grounds.[277] Under the pressure of litigation the Air Force has modified some of its rules.[278] Whatever the outcome of this litigation, however, these policies will have to be reexamined and reformulated when the Amendment is passed. If the rules continue to require discharge of women with dependent children, then men in a similar situation will also have to be discharged. Since this will make it almost impossible to have any career officers, such a rule is unlikely to be adopted. The nondiscriminatory alternative is to allow both men and women with children to remain in the service and to take their dependents on assignments in non-combat zones, as men are now permitted to do.

Rules requiring discharge because of pregnancy will also change. The Army has recently provided that married women who plan to remain in the service with their children may receive a three and a half month leave to bear the child.[279] Such a leave is related to a unique physical characteristic of women, and if shown to be directly related to the physical condition of pregnancy, can be applied to women only.

Distinctions between single and married women who become pregnant will be permissible only if the same distinction is drawn between single and married men who father children. This is required because once the Army has allowed married women to continue to serve when they have children, it is clear that pregnancy and childbearing alone are not incompatible with military service. A rule excluding single women who become pregnant would thus not be based on physical characteristics, but rather would rest on disapproval of extramarital pregnancy. Such standards must be applied equally to both sexes. Thus, if unmarried women are discharged for pregnancy, men shown to be fathers of children born out of wedlock would also be discharged. Even in this form such a rule would be suspect under the Amendment, because it would probably be enforced more frequently against women. A court will therefore be likely to strike down the rule despite the neutrality in its terms, because of its differential impact. To avoid these problems, the Armed Forces can treat both sexes similarly by permitting single people to father or bear children, and by regulating only the unique physical characteristic of pregnancy.

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[276] 32 C.F.R. §§ 714.1(d)(3) (1968); 888.5 (1970).

[277] See the challenges reported in N.Y. Times, Aug. 26, 1970, at 44, col. 7; N.Y. Times, Oct. 18, 1970, at 49, col. 1; N.Y. Times, Nov. 29, 1970, at 26, col. 1; N.Y. Times, Dec. 31, 1970, at [illegible], col. 2; N.Y. Times, Jan. 3, 1971, at 24, col. 1.

[278] *See* N.Y. Times, Sept. 29, 1970, at 46, col. 1; N.Y. Times, Sept. 30, 1970, at 87, col. 4.

[279] *See* N.Y. Times, April 21, 1971, at 11, col. 1.

All people who have children will be treated equally by the Armed Forces in terms of child care. The military may want to provide day care; if it does not, it may allow a parent to be discharged to take care of his or her child if he or she cannot provide for adequate care while on active duty.

3. *Assignment and Training*

All men who are drafted receive four to six months of basic training. All draftees are eligible for combat duty. The men are assigned to one of five broad areas of duty—administration, intelligence, training and tactics, supply, or combat. They are assigned and organized along two different but overlapping systems of classification. One is a numerical system, and the other is a functional one. "Corps" is the general name for the functional units, such as the Army Engineer Corps or the Army Nurse Corps, though the term "corps" is also used to designate a numerical grouping of two to five divisions. Although the members of a functional corps are physically dispersed in job assignments, the corps keeps separate records, and promotions and assignments are routed through its office. Almost all of the women in the Army are members of the Army Nurse Corps or the Women's Army Corps. Although the Army Nurse Corps is organized along job lines, the WAC has no unifying principle except that its members are women. It thus stands as a symbol of the unwillingness of the Army to abandon distinctions based on sex. Under the Equal Rights Amendment the WAC would be abolished and women assigned to other corps on the basis of their skills.

Women are only partially integrated into the training and assignment procedures applicable to men. They receive some basic training but it does not equip them for combat duty. They serve mainly in administrative and clerical jobs or as medical technicians.

Whether women ought to serve in combat units has provoked lengthy debate. Before discussing the arguments raised against it, it is important to place the problem in perspective. Some public debate has implied that hundreds of thousands of women will be affected by such a requirement. This is not true. Combat soldiers make up only a small percentage of military personnel. Even in combat zones many jobs of logistic and administrative support are no different or more difficult than the work done in non-combat zones. Thirty years ago, women were found capable of filling over three-quarters of all Army job classifications,[280] and there is no reason to prevent them from doing these jobs in combat zones. The issue of assigning women to actual combat duty, therefore, involves a relatively small segment of total military assignments.

Opponents of the Amendment claim that women are physically incapable of performing combat duty. The facts do not support this conclusion. The effectiveness of the modern soldier is due more to equipment and training than to individual strength. Training and combat may require the carrying of loads weighing 40 to 50 pounds, but many, if not most, women in this country are fully able to do that.[281] And women are physically as able as men to perform many jobs classified as combat duty, such as piloting an airplane or engaging in naval operations. In order to screen out those of both sexes incapable of combat service, it will be permissible to administer a test to measure ability to do the requisite physical tasks. Those who pass, or who will foreseeably be able to do so after training, will receive combat training. The test will have to be closely related to the actual requirements of combat duty. There will be many women able to pass such a test.

Another frequent objection to women in combat service is based on speculation about the problems that will arise in terms of discipline and sexual activity. No evidence has been found that participation by women will cause difficult problems. Women in other countries, including Israel and North Vietnam, have served effectively in their armed forces. There is no reason to assume that in a dangerous situation women will not be as serious and well disciplined as men.

Finally, as to the concern over women engaging in the actual process of killing, no one would suggest that combat service is pleasant or that the women who serve can avoid the possibility of physical harm and assault. But it is important to remember that all combat is dangerous, degrading and dehumanizing. That is true for all participants. As between brutalizing our young men and brutalizing our young women there is little to choose.

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[280] M. Treadwell, *supra* note 250, at 92-93.

[281] *See, e.g.*, Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754, 758-59 (M.D. Ala. 1969).

4. *In-service Conditions*

Women in the Armed Forces receive the same pay and are ranked the same as men. Most service and veterans' benefits are the same for both sexes. On the other hand the rules on dependents' allowances, in-service housing and medical benefits discriminate against women. Male officers are provided quarters on base, or a basic quarters allowance for their dependents if they live off base; male officers also receive a dependents' allowance based on their grade and the number of dependents, regardless of any money the officer's wife may earn. The husband of a female officer, however, is not recognized as a dependent unless he is physically or mentally incapable of supporting himself and is dependent on his wife for more than half of his support.[282] These discriminations are now under attack in a suit against the Air Force.[283] Should they not be stricken down, the Equal Rights Amendment will require that result. Women will receive housing, allowances, and medical benefits on the same basis as men.

Living conditions in the service will be changed by adoption of the Equal Rights Amendment to the extent that they separate men and women for functions in which privacy is not a factor. Officers' clubs, enlisted mens' clubs, and other social organizations and activities on military bases will be open to women as well as men. Athletic facilities will also have to be made available to women personnel. Eating facilities will likewise be integrated by sex. Sleeping quarters could remain separate under the privacy exception to the Amendment.

5. *Summary*

The Equal Rights Amendment will result in substantial changes in our military institutions. The number of women serving, and the positions they occupy, will be far greater than at present. Women will be subject to the draft, and the requirements for enlistment will be the same for both sexes. In-service and veterans' benefits will be identical. Women will serve in all kinds of units, and they will be eligible for combat duty. The double standard for treatment of sexual activity of men and women will be prohibited.

Changes in the law, where necessary to bring the military into compliance with the Amendment, will not be difficult to effect. The statutes governing the military will be amended by Congress, and the services can revise their own regulations. If these changes are made promptly, no disruption in the functioning of the military need result.

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[282] Provisions on basic pay are at 37 U.S.C. §§ 201-09 (Supp. V, 1969). Housing and other allowances are dealt with by 37 U.S.C. §§ 401-427 (Supp. V, 1969).

[283] See the report in the N.Y. Times, Dec. 25, 1970, at 18, col. 6.

The drafting of women into the military will expose them to tasks and experiences from which many of them have until now been sheltered. The requirement of serving will be as unattractive and painful for them as it now is for many men. On the other hand, their participation will cure one of the great inequities of the current system. As long as anyone has to perform military functions, all members of the community should be susceptible to call. When women take part in the military system, they more truly become full participants in the rights and obligations of citizenship.

VI. Conclusion

The transformation of our legal system to one which establishes equal rights for women under the law is long overdue. Our present dual system of legal rights has resulted, and can only result, in relegating half of the population to second class status in our society. What was begun in the Nineteenth Amendment, extending to women the right of franchise, should now be completed by guaranteeing equal treatment to women in all areas of legal rights and responsibilities.

We believe that the necessary changes in our legal structure can be accomplished effectively only by a constitutional amendment. The process of piecemeal change is long and uncertain; the prospect of judicial change through interpretation of the Fourteenth Amendment is remote and the results are likely to be inadequate. The Equal Rights Amendment provides a sound constitutional basis for carrying out the alterations which must be put into effect. It embodies a consistent theory that guarantees equal legal rights for both sexes while taking into account unique physical differences between the sexes. In the tradition of other great constitutional mandates, such as equal protection for all races, the right to freedom of expression, and the guarantee of due process, it supplies the fundamental legal framework upon which to build a coherent body of law and practice designed to achieve the specific goal of equal rights.

The call for this constitutional revision is taking place in the midst of other significant developments in the movement for women's liberation in this country. The movement as a whole is in a stage of ferment and growth, seeking a new political analysis based upon greater understanding of women's subordination and of the need for new directions. The resulting political discussion has brought forth many possibilities, including changes in work patterns, new family structures, alternative forms of political organization, and redistribution of occupations between sexes. A number of feminists have argued for increased separation of women from men in some spheres of activity or stages of life. Dialogue and experimentation with many forms of social, political and economic organization will undoubtedly go on as long as the women's movement continues to grow.

Underlying this wide-ranging debate, however, there is a broad consensus in the women's movement that, within the sphere of governmental power, change must involve equal treatment of women with men. Moreover, the increasing nationwide pressure for passage of an Equal Rights Amendment, among women both in and out of the active women's movement, makes it clear that most women do not believe their interests are served by sexual differentiation before the law. Legal distinctions based upon sex have become politically and morally unacceptable.

In this context the Equal Rights Amendment provides a necessary and a particularly valuable political change. It will establish complete legal equality without compelling conformity to any one pattern within private relationships. Persons will remain free to structure their private activity and association without governmental interference. Yet within the sphere of state activity, the Amendment will establish fully, emphatically, and unambiguously the proposition that before the law women and men are to be treated without difference.

APPENDIX

LEGISLATIVE HISTORY OF THE EQUAL RIGHTS AMENDMENT

Year	Cong.	Sess.	Joint Resolutions	Hearings (Committees on the Judiciary)	Committee Reports	Debate Cong. Rec.	Page	Votes
1923	68th	1st	S.J. Res. 21			65	150	
1925	69th	1st	S.J. Res. 11			67	486	
1927	70th	1st	H.R.J. Res. 310; S.J. Res. 64			69	931	
1929	70th	2d		On S.J. Res. 64 Sen. Subcomm.				
1929	71st	1st	S.J. Res. 52			71	2312	
1931	71st	3d		On S.J. Res. 52 Sen. Subcomm.				
1931	72d	1st	H.R.J. Res. 197			75	1755	
1932	72d	1st		On H.R.J. Res. 197 House Comm.				
1933	73d	1st	S.J. Res. 1	On S.J. Res. 1 Sen. Subcomm.		77	49	
1935	74th	1st	H.R.J. Res. 250			79	5079	
1937	75th	1st	S.J. Res. 65			81	884	
1938	75th	2d & 3d		On S.J. Res. 65 Sen. Subcomm.	S. Rep. No. 1641 (not printed)	83	5684, 6289	
1939	76th	1st	S.J. Res. 7			84	70	
1941	77th	1st	S.J. Res. 8			87	40	
1942	77th	2d			S. Rep. No. 1321 (not printed)	88	4033	
1943	78th	1st	S.J. Res. 25		S. Rep. No. 267	89	257, 271, 5017	

APPENDIX CONTINUED

Year	Cong.	Sess.	Joint Resolutions	Hearings (Committees on the Judiciary)	Committee Reports	Debate Cong. Rec.	Page	Votes
1945	79th	1st	H.R.J. Res. 42	On H.R.J. Res. 1, 42 etc. House Comm.	H.R. Rep. No. 907	91	59, 7505, 9534	
1946	79th	2d			S. Rep. No. 1013	92	1900, 2142, 9223-29, 9293-97, 9303-35, 9397-9405	38/35 (Sen.)
1947	80th	1st	H.R.J. Res. 49; S.J. Res. 76			93	157, 1264	
1948	80th	2d	H.R.J. Res. 397	On H.R.J. Res. 49, H.R. 1972, etc. House Subcomm.	H.R. Rep. No. 2196; S. Rep. No. 1208	94	218, 5555	
1949	81st	1st	S.J. Res. 25		S. Rep. No. 137	95	2887, 4246 5810, 6593, 13297, 14722	
1950	81st	2d				96	626, 704, 738-44, 758-62, 809-13, 826, 828-34, 861-73 1008	51/31 (Sen.) (Hayden Amend.); 18/65 (Sen.) (Kefauver Amend.); 63/19 (Sen.) (ERA as amended).
1951	82d	1st	S.J. Res. 3		S. Rep. No. 356	97	901, 5663	

APPENDIX CONTINUED

Year	Cong.	Sess.	Joint Resolutions	Hearings (Committees on the Judiciary)	Committee Reports	Debate Cong. Rec.	Debate Page	Votes
1953	83d	1st	S.J. Res. 49		S. Rep. No. 221	99	1386, 4513 8884-85, 8951-74, 9118	58/25 (Sen.) (Hayden Amend.); 73/11 (Sen.) (ERA, as amended).
1954	83d	2d	H.R.J. Res. 359			100	84	
1955	84th	1st	H.R.J. Res. 1			101	49, 1338, 11088	
1956	84th	2d	S.J. Res. 39	On S.J. Res. 39 Sen. Subcomm.	S. Rep. No. 1991	102	8018, 8359, 8537	
1957	85th	1st	S.J. Res. 80		S. Rep. No. 1150	103	5073, 9593, 15999, 16681	
1959	86th	1st	S.J. Res. 69		S. Rep. No. 303	105	3529, 5729, 8555, 10605, 19099, 19634	
1963	88th	1st	S.J. Res. 45			109	2390, 2405- 06,2712,5586-87, 8263	
1964	88th	2d			S. Rep. No. 1558			

APPENDIX CONTINUED

Year	Cong.	Sess.	Joint Resolutions	Hearings (Committees on the Judiciary)	Committee Reports	Debate Cong. Rec.	Debate Page	Votes
1965	89th	1st	S.J. Res. 85			111	11336, 12682, 14007, 14687, 16621, 17367- 68, 23796	
1967	90th	1st	S.J. Res. 54			113	97[illegible]6, 20[illegible]19, 23012, 33615	
1969	91st	1st	H.R.J. Res. 264; S.J. Res. 61			115	395, 2082	

APPENDIX CONTINUED

Year	Cong.	Sess.	Joint Resolutions	Hearings (Committees on the Judiciary)	Committee Reports	Debate Cong Rec.	Page	Votes
1970	91st	2d		On S.J. Res. 61 Sen. Subcomm.; On S.J. Res. 61 & 231, Sen. Comm.	Discharge Petition, House of Rep.	116	7948-85 (Aug. 10); 17229-35 (Oct. 6); 17335-63 (Oct. 7); 17485-91 (Oct. 8); 17629-57 (Oct. 9); 17745-58, 17779-94 (Oct. 12); 17815-16, 17892-95, 17923-50 (Oct. 13); 18075-78 (Oct. 14)	350/15 (House); 36/33 (Sen.) (Ervin Amend.); 50/20 (Sen.) (Baker Amend.).
1971	92d	1st	H.R.J. Res. 208; S.J. Res. 8	On H.R.J. Res. 208 House Subcomm.		117	237 (Jan. 26); 17 (Jan. 25).	

(Statement of Dean Pound, and other lawyers and legal scholars in opposition to the equal rights amendment)

These lawyers and legal scholars—regardless of party, and regardless of political or economic views—oppose the so-called equal rights amendment, and endorse the statement set forth herein, on the legal implications of the proposed amendment, prepared by Professor Paul Freund, of the Harvard Law School:

Roscoe Pound, School of Law, University of California, Former Dean, Harvard Law School.

Clarence Manion, Former Dean of the College of Law, University of Notre Dame, Indiana.

Albert J. Harno, Dean of the College of Law, University of Illinois.

Charles Warren, Constitutional Lawyer and Author of "The Supreme Court in United States History", Washington, D.C.

Walter Frank, Lawyer, New York City.

Leon Green, Professor of Law, University of Texas. Former Dean, School of Law, Northwestern University.

Dorothy Kenyon, Lawyer and former Judge of Municipal Court, New York City.

Prof. M. R. Kirkwood, Palo Alto, California.

Monte M. Lemann, Lawyer and former President, Louisiana State Bar Association, New Orleans.

E. Blythe Stason, Dean of the Law School, University of Michigan.

Harry Shulman, Sterling Professor of Law, Yale University Law School.

William H. Holly, United States District Judge, Chicago.

Everett Fraser, Emeritus Dean of Law School, University of Minnesota. Professor of Law, Hastings College of Law, University of California.

Walter Gellhorn, Professor of Law, Columbia University Law School.

Glenn A. McCleary, Dean of the Law School, University of Missouri.

Douglas B. Maggs, Professor of Law, Duke University Law School and Former Solicitor, U.S. Department of Labor.

The following statement on legal implications of proposed Federal equal rights amendment has been endorsed by the Deans and Professors of leading Law Schools and by the eminent attorneys, jurists, and constitutional lawyers listed above.

The proposed amendment to the Constitution reads as follows:

"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation.

"This amendment shall take effect three years after the date of ratification."

If anything about this proposed amendment is clear, it is that it would transform every provision of law concerning women into a constitutional issue to be ultimately resolved by the Supreme Court of the United States. Every statutory and common law provision dealing with the manifold relation of women in society would be forced to run the gauntlet of attack on constitutional grounds. The range of such potential litigation is too great to be readily foreseen, but it would certainly embrace such diverse legal provisions as those relating to a widow's allowance, the obligation of family support and grounds for divorce, the age of majority and the right of annulment of marriages, and the maximum hours of labor for women in protected industries.

Not only is the range of the amendment of indefinite extent, but, even more important, the fate of all this varied legislation would be left highly uncertain in the face of judicial review. Presumably, the amendment would set up a constitutional yardstick of absolute equality between men and women in all legal relationships. A more flexible view, permitting reasonable differentiation, can hardly be regarded as the object of the proposal, since the Fourteenth Amendment has long provided that no state shall deny to any person the equal protection of the laws, and that Amendment permits reasonable classifications while prohibiting arbitrary legal discrimination. If it were intended to give the courts the authority to pass upon the propriety of distinctions, benefits and duties as between men and women, no new guidance is given to the courts, and this entire subject, one of unusual complexity, would be left to the unpredictable judgments of courts in the form of constitutional decisions.

Such decisions could not be changed by act of the legislature. Such a responsibility upon the courts would be doubtless as unwelcome to them as it would be inappropriate. As has been stated, however, the proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality. This branch of the dilemma is as repelling as the other. It appears to be accepted by what is currently the most authoritative statement on this Amendment—the Report of the House Judiciary Committee, H. Rep. 907, 79th Cong. 1st sess., on H. J. Res. 49 dated July 12, 1945. The majority of the Committee appears to recognize that under the Amendment the many laws protecting the safety and welfare of women in industry would necessarily fall. The Committee states: "To say the least of the matter, many of the large organizations of women represented in hearings before the committee have expressed a sincere desire to waive the so-called preferential benefits now accorded to women by various laws so as to permit them to follow economic activities from which they are now excluded."

It would not be feasible to attempt to enumerate the wide variety of laws and rules of the common law which would fall under the impact of the Amendment. Some conception of their scope may, however, be given by recalling the variety of relationships in which women stand in the community. These relationships may be summarized as (a) wage earner; (b) member of a family; (c) citizen; (d) individual. The law has recognized and attempted to deal with these relationships in a concrete way. Doubtless there are difficulties and anachronisms in the law which should be remedied. But the method adopted by the Amendment is to ignore the basis for all that has been at the foundation of these measures, and to substitute an abstract rule of thumb. The practical effect of such a course can be suggested by referring briefly to each of the four categories mentioned above.

(a) *As wage earners.* One of the most familiar forms of legislation is that which confers special protection on women in industry, through the prohibition of employment in hazardous occupations and through regulation of night work and maximum hours of labor. Presumably the long struggle to place these protective measures on the statute books would be set at nought by the adoption of the Amendment. Specifically, such statutes would apparently have to be held invalid as denying to women the equal "right" to work or as denying to men the equal right of protection under the law, for, it is to be noted, the amendment requires equality of rights under the law, permitting either men or women to claim exact equality. How the problem would be met can only be left to conjecture. If a state legislature failed to revise the laws giving special protection to women in certain industries, it is left uncertain whether the entire pattern of industrial legislation would be torn apart by judicial decision or whether a court would undertake to legislate by raising the same protection for men. Surely the work of generations ought not to be left to this blind hazard.

(b) *As members of the family.* Legislation in the latter part of the nineteenth and early part of the twentieth century, commonly known as married women's acts, fairly universally, in this country removed the disabilities which the common law had placed upon married women with respect to the right to sue and be sued, the right to own separate property and the right to engage in commercial transactions. It is true that in some states certain remnants of these disabilities have persisted. In a few states, for example, a married woman may not become a surety for her husband's debts, on the theory that she might otherwise be imposed upon; if the reason which has led some states to retain this disability is not a sufficient one, the disability should of course be removed by further legislation.

Similarly, in a few states a married woman's earnings, while belonging to her if they result from work outside the home, are held to enure to the husband if they are produced by working inside the home. Whether this is a fair adjustment in view of the husband's primary duty to support the family may be a fairly debatable question, which again can be resolved by further legislation if further reform is thought desirable. The proposed Amendment would leave no room for legislative experiment along these lines, but would impose a requirement of absolute equality in the property rights of husband and wife.

More seriously, it would presumably abolish the common rule whereby a husband has the primary duty of support toward his family, and whereby in many jurisdictions failure to render such support is a ground for separation or divorce. Precisely how the law of support is to be transformed as a result of the Amendment is by no means clear. The concept of a primary duty does not lend itself to a rule of equality.

The very least that can be said is that the complex and delicate field of marital relationships and divorce, into which Congress has sedulously declined to enter in the past, would now be gravely affected by the tangential force of a constitutional amendment, which would not even rest on a study of the manifold problems involved.

It is worthy of note that the community property system of eight western states, which have evolved differently from the common law systems and which, in general, have recognized for a longer period the coordinate status of husband and wife, nevertheless contains inequalities which would doubtless be rendered invalid under the amendment. Thus the husband is generally regarded as a kind of managing partner with special powers not possessed by the wife in respect of community property. Legislation would doubtless be required to produce conformity with the dictates of the Amendment, and the ramifications of such legislation, particularly with respect to the special tax status of persons owning community property, cannot be predicted with certainty.

(c) *As citizens.* While the suffrage amendment and other legislation have generally guaranteed to women an equality of civil and political rights, there remain some gaps which it is undoubtedly one purpose of the Amendment to close. One of these is the distinction drawn in some states between the obligation of men and that of women for jury service. But whether the Amendment would in fact require a change in this field is itself uncertain, since it is fairly arguable that jury service is not a right but a duty and hence not within the scope of the Amendment. Indeed, the Amendment opens up a whole field of potential controversy turning on distinction between rights and duties.

(d) *As individuals.* A common legislative difference in the treatment of men and women concerns the age of majority, which is generally lower for the latter. This difference has long been accepted as reflecting physical realities. Presumably the distinction would no longer be valid. But if a legislature failed to change the law, the outcome would present something of a legal puzzle. If the age of majority for men is eighteen and women sixteen, it can hardly be foretold whether equality would require a lowering of the former or a raising of the latter. If the standard be that of the greater right, it could be asserted that the lower age for women provides a greater right to marry but at the same time a more restricted right to annul on the ground of minority. How a court would solve the conundrum is, like most problems created by the, proposed Amendment, a matter purely of speculation.

The basic fallacy in the proposed Amendment is that it attempts to deal with complicated and highly concrete problems arising out of a diversity of human relationships in terms of a single and simple abstraction. This abstraction is undoubtedly a worthy ideal for mobilising legislative forces in order to remedy particular deficiencies in the law. But as a constitutional standard, it is hopelessly inept. That the proposed equal rights amendment would open up an era of regrettable consequences for the legal status of women in this country is highly probable. That it would open up a period of extreme confusion in constitutional law is a certainty.

PAUL FREUND,
Professor of Law, Harvard Law School.

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A Point of View and Five Responses

THE CASE FOR AN EQUAL RIGHTS ACT

by Gayle Binion

Through simple legislation under Article I and the Fourteenth Amendment of the Constitution, Congress can already go beyond what the Equal Rights *Amendment* will do when it is finally ratified. The 1965 Voting Rights Act — the most effective civil rights legislation in American history — serves as an excellent model and analogy for an Equal Rights *Act*.

Article I is the source of federal legislative authority *generally*. And the Fourteenth Amendment prohibits states from denying to any person within their jurisdiction the equal protection of the laws. Section 5 of this amendment grants Congress the power to pass appropriate legislation to carry out the provisions of the amendment. Combined, these two sources of authority are sufficient to empower Congress to prohibit any governmental entity at whatever level from discriminating on the basis of sex. And that is all that the Equal Rights *Amendment* will do.

My suggestion that Congress, through simple legislation, can accomplish all that the Equal Rights *Amendment* will accomplish, and more, meets with two immediate objections — one philosophical and one pragmatic.

The first objection holds that the equal protection clause in the Fourteenth Amendment does not cover women because the framers of the amendment after the Civil War intended it to cover only blacks. The answer to that objection is that while the protection of newly freed slaves was clearly the major purpose of this clause, the courts, over time, have come to see it as a protection for other groups as well — aliens, illegitimate children, the poor, and women. One could point analogously to the fact that the search and seizure clause of the Fourth Amendment was not intended to apply to automobiles or wiretaps — the eighteenth-century framers could not have intended this — but the courts have recognized that the principles underlying the Fourth Amendment, when applied to modern conditions, require new interpretations. The problem is not that the Fourteenth Amendment's protection does not include women — it is only that the courts have not yet recognized the full extent of this protection. But Congress, under Section 5, can do so. Under decisions such as *Fitzpatrick v. Bitzer* (1976) *EEOC v. Wyoming* (1983), the Supreme Court is likely to uphold even far-reaching congressional condemnations of state laws which discriminate on the basis of gender. The objection that the Fourteenth Amendment does not protect women is not very persuasive.

The second objection to using a statutory route to equal rights is more substantial. It holds that an Equal Rights *Act* passed by one Congress can easily be repealed by another Congress. I believe that this is an unlikely occurrence, but that the advantages of such an Act outweigh the potential danger. The 1965 Voting Rights Act is an excellent example of the staying power of egalitarian laws. It supports

"Article I and the Fourteenth Amendment empower Congress to prohibit government from discriminating on the basis of sex."

the maxim that "the idea of equality once loosed is not easily cabined." Despite heavy pressure from some Southern politicians, the Voting Rights Act has been extended and strengthened on several occasions. Last year, President Ronald Reagan targeted the act for dilution, if not extinction; instead, it was once again strengthened and extended. The Voting Rights Act has borne the extra burden of having expiration dates. In an Equal Rights *Act* without an expiration date, those who would seek to repeal it would face an uphill battle.

Perhaps the greatest practical advantage of an Equal Rights *Act* is that an act is more easily passed than is a constitutional amendment. Simple legislation requires only a majority vote in each house of the Congress and the signature of the President. President Reagan has already announced that he favors equal rights, but does not approve of the constitutional amendment route. The passage by Congress of an Equal Rights *Act* will give him the opportunity to make good on his announced position. Should the President veto the bill, despite his public assurance that he favors equal rights, Congress could override with a two-thirds vote in each house. In contrast, a constitutional amendment requires passage by a two-thirds vote in each house and ratification by the legislatures or ratifying conventions in three-fourths of the states. This will take years of lobbying, whereas a statute can become law in one term of the Congress. One might also keep in mind that it may be possible to persuade senators and members of the House who have reservations about a constitutional amendment to support a more "temporary" measure of statutory legislation.

Parenthetically, it should be noted that the Equal Rights Amendment, reintroduced this term in Congress, has enormous support in both the House and Senate. In the House, there are now 234 co-sponsors; it needs only 290 to pass, and the House Judiciary Committee is supportive. In the Senate there are now fifty-seven co-sponsors; it needs sixty-seven to pass; *but* the Senate Judiciary Committee, chaired by Strom Thurmond, is not supportive. Even if the amendment passes easily out of committee in both houses and gets the two-thirds vote in each chamber, there are substantial hurdles in the states. While Illinois and Florida — two important non-ratifying states — now have somewhat more sympathetic state legislatures, other states have retrogressed. In 1972, it should be recalled, the ERA passed, 354 to 23, in the House, and 84 to 8 in the Senate. But this support was not reflected in a sufficient number of state legislatures for the momentum to carry to ratification.

It should also be noted that during the last two years, twelve powerful state legislators thwarted a substantial public will in support of the amendment. Finally, one must remember that under Article 3 of the Equal Rights Amendment, its provisions do not take effect until two years after ratification. In sum, one of the primary virtues of a statutory approach to the ERA is the greater speed with which it can be accomplished.

There are, however, other, more substantive virtues of an Equal Rights *Act*. The proposed Equal Rights *Amendment* declares that "equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex." While this will need judicial interpretation, it is very likely that the courts will simply define sex — as race is now defined — as a "suspect" classification. This would prohibit states (or the federal government) from overtly using gender in its laws and policies without demonstrating that it had a compelling need to do so. The term "on account of" suggests purposeful discrimination. An Equal Rights *Act* could go further. It could base discrimination on the effects of laws rather than just on the intent or facial content of them. Here, again, the 1965 Voting Rights Act serves as an excellent model. In 1980, the Supreme Court held that voting rights are not abridged unless the discrimination complained of was by governmental design. In its 1982 extension of the Voting Rights Act, Congress has adopted an effects test for racial discrimination in voting so that laws adopted for whatever reasons will be disallowed if they result in discrimination in the electoral process, even if there are no references to race in the challenged laws. Why is this also so important in the area of sex discrimination? Because intentional discrimination is only part of the problem. Sex discrimination falls into two categories. One is overt and intentional, and reflects stereotypical thinking about the role and nature of women. The second, which is far more prevalent and problematic in our society, results not from any demonstrable desire to disadvantage women, but rather from a lack of concern about the effect of otherwise benign legislation on women as a group.

Overt discrimination has given us laws prohibiting women from practicing certain professions, serving on juries, or from having control over property. A few examples of the disposition of Supreme Court cases challenging these policies will demonstrate the kind of thinking that has traditionally pervaded public policy.

In *Bradwell v. Illinois*, in 1873, the U.S. Supreme Court upheld the refusal of Illinois to admit women to the bar. The court held that it did not violate the privileges and immunities of U.S. citizenship. Justice Joseph Bradley, in concurrence, offered this rationale:

"Civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."

The court thus implied that preventing women from practicing law was God's law — and not only could states do so, they should do so.

One does not have to go back to the nineteenth century to find examples of the court upholding state laws classifying women on the basis of assumptions about their "natural" roles and how these natural roles should restrict their entry into other spheres of life. In 1948, the Supreme Court upheld a Michigan law which prohibited women from tending bar unless the bar was owned by a father or husband. Justice Felix Frankfurter reasoned:

"Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced does not preclude the states from drawing a sharp line between the sexes, certainly in such matters as the regulation of liquor traffic." The Court went on to say that the only constitutional issue was whether it was rational to differentiate between the wives and daughters of the bar owner and all other women. The Court concluded that it was not irrational for the Michigan legislature to believe that wives and daughters would be better protected in the bar than would non-relatives. It is also possible, although not noted by the Court, that the Michigan legislature simply did not want to deprive bar owners of one source of free labor.

The U.S. Supreme Court, as recently as 1961, unanimously held that women could be exempted from jury service. Under Florida law (and at that time with minor variation the law of seventeen other states and the District of Columbia), women were automatically excluded from jury lists unless they volunteered in person to be added to those lists. One Mrs. Hoyt was charged with murdering her husband and, despite a plea of insanity, was convicted of second-degree murder by an all-male jury. It was not surprising that the jury was all male because of ten thousand people on the jury rolls, only ten were women. Mrs. Hoyt objected to the absence of women on her jury; she thought that they would have understood *why* she killed her husband. Justice John Marshall Harlan reasoned that Florida was free to rely on its jury selection system. He said, "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a state, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." Other courts have upheld exemption of women from jury service on the rationale that women should not be exposed to the seamier side of life that is seen in a criminal trial.

Gayle Binion

These sorts of extreme laws are no longer upheld by the U.S. Supreme Court. Since *Reed v. Reed* in 1971, the Court, in dozens of cases, has rejected sex classifications in both state and federal laws and policies because the government did not demonstrate that there was a close and substantial relationship between an important governmental objective and the use of overt sex-gender classifications. These have included differences between the sexes with respect to alcoholic beverages, military dependents' benefits, age of emancipation from fatherly support, pension and survivor benefit plans. Whereas in the past the Court had simply deferred to legislative conceptions of what constituted reasonable distinctions between the sexes, the Court has come to apply a moderate level of scrutiny. In 1981, however, the Court upheld both the male-only registration for the military draft and California's statutory rape law on the theory that men and women are not similarly situated: in the draft case because women cannot go into combat and in the statutory rape case because only women can become pregnant. These are the two most prominent examples of overt gender classifications still permissible under the Supreme Court's interpretation of the equal protection clause and the due process clause of the Fifth Amendment. The Equal Rights *Amendment* would reverse these two decisions unless the respective governments could demonstrate a compelling need to use these gender-based distinctions. But, again, these are all examples of overt sex classifications.

What the Equal Rights *Amendment* is unlikely to affect is the second type of discrimination — that which results from laws which are *neutral on their face* but which inflict significantly different hardships on men and women as classes of people. For example, in 1975, in the Geduldig case, the Supreme Court upheld California's disability program which exempted pregnancy from its coverage. The court reasoned that this did not constitute sex discrimination — i.e., women being treated differently from men. The court held that *if* the law created any classification it was between pregnant women and all other persons. But since not all women were pregnant women, there was no discrimination based on sex. (This decision led to the Pregnancy Discrimination Act of 1978.)

The Court has also upheld veterans' preference laws which give veterans priority for public employment while severely restricting the employment opportunities for women. In the Feeney case in 1979, the court upheld Massachusetts' system which gave to any veteran, merely passing the civil service test, priority for life over all other successful test-takers. The fact that 98.2 per cent of the veterans in the state were men did not, in the Court's view, constitute sex discrimination. The law was neutral on its face — women veterans were as eligible to take advantage of it as were male veterans. Therefore the Court would not scrutinize the effects of the law, or their origin in the discriminatory recruitment policies of the military. Unless one could demonstrate that the veteran preference law was but a smoke screen to discriminate against women — and this is not likely to be the case — the Court will look to its facial neutrality.

Other kinds of public policies which appear neutral but which have negatively discriminatory impacts on women include height or weight requirements for public employment, unequal pay for comparable work, and various pension programs which the Court has interpreted to prohibit the division of pensions under state community property laws. Each of these kinds of policies can be prohibited by separate congressional legislation, but that is costly and time-consuming; and in many cases the source of the inequity is Congress itself. An Equal Rights *Act* with an "effects" standard could require that governments demonstrate some significant reason for adopting policies which are disproportionately disadvantageous to one sex.

I am not arguing that no law should be allowed that hurts one sex more than another. My recommendation is conservative. It is that the law should require that the disadvantageous effects or impacts that follow from a law or policy must be justified as essential to the achievement of a significant governmental objective. In other words, if governments could accomplish important ends with a less discriminatory policy, they should be required to do so. This will require some judicial interpretation and balancing. But, more important, it will require that governments consider the impact of policies and legislation on women. If we care enough about the environment to require environmental impact reports before setting in motion new industrial programs or creating new projects, we should care enough about sexual equality to require an analogous level of concern.

To take another analogy, this "least discriminatory alternative test" would simply apply to sexual equality the minimal concern that we apply to freedom of speech under the First Amendment. Thus, if states want to reintegrate veterans into the work force and reward them for serving their country, they should be required to do so with the least negative impact on women as a group. Something far less than a complete lifetime preference in public employment for military veterans would be called for. An Equal Rights *Act* could set this kind of standard; an Equal Rights Amendment, on its own, will not do this — it will restrict only overt and purposeful discrimination on the basis of sex. It is not likely that the Supreme Court would apply an "effects" standard to an amendment which refers to discrimination "*on account* of sex."

Another justification for an Equal Rights *Act* is that statutory law can offer incentives and punishments, whereas constitutional law offers only legal principles. Congress could, for example, link allocation of federal funds to the degenderizing of state policies. Allocation of federal highway funds is already conditioned on states adopting vehicle inspection laws. Why not demand the same level of protection for sexual equality?

The statutory ERA could also impose significant civil or criminal penalties on those who failed to bring state law into compliance with the terms of the federal law. France, a country not known for its sexual egalitarianism, has recently adopted legislation with criminal penalties for unequal pay for equal work.

Perhaps most important, we must recognize that the achievement of national legal sexual equality will require a serious administrative commitment by the federal government. Individual and even class-action litigation is a terribly ineffective and inefficient way to bring about significant social, political, or economic change on behalf of women. The Equal Rights Amendment on its own will give us an important basis for litigation but legally nothing more. The Equal Rights *Act* that I propose has primarily an administrative rather than litigative focus. Here, again, the Voting Rights Act is an important model. The federal government dispatched federal voting registrars to states with low black voter registration or turnout; it could similarly assign federal "de-genderizers" to obstinate states. And just as the Attorney General has had to pre-clear states' voting changes under Section 5 of the Voting Rights Act, he or she could be empowered to pre-screen state laws which might further disadvantage women. This would defeat the evasive tactic of replacing current legal disadvantages with new ones.

Finally, it must be acknowledged that even if the Twenty-seventh Amendment had been ratified we would still have needed the kind of federal legislation that I am arguing for. Without it, the Equal Rights Amendment would — through litigation — have invalidated only most of the overt or illicitly motivated uses of gender in public policies, that which is only the tip of the iceberg in sexual inequality in the law.

In sum, let us reverse the order of priority. Persuade Congress to pass an Equal Rights *Act* — an act which will (1) have an impact standard for discrimination; (2) demonstrate a federal administrative commitment; and (3) include effective incentives and punishments. The electoral battles will continue in the non-ratified states. Perhaps by the time that an Equal Rights *Act* has made its contribution, the composition of the states' legislatures will be less obstructionist and the constitutional amendment will be ratified. I believe that we need the Twenty-seventh Amendment for philosophical and political reasons. But we do not need it for legal reasons. We do not need it in order to proceed with an agenda for legislative change.

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CONGRESS SHOULD SIMPLY ENFORCE THE CONSTITUTION

JUDITH HICKS STIEHM

Once upon a time valorous young men rode up glass mountains, slew dragons, and collected golden apples to win their king's approval (and often his daughter's hand). Today, civic women of all ages are seeking the votes of two-thirds of U.S. representatives, two-thirds of U.S. senators, and three-fourths of the state legislatures (all but one of which have two houses) in order to win constitutional recognition of their equal rights. How did otherwise reasonable women get seduced into imitating young men's rites of passage — into accepting an extraordinary trial to prove their worthiness? Did they not once question the rules of the game? Did they not assess the price and/or possibility of success? Did they not wonder why so few men resisted them and, equally, why so few men assisted them?

The U.S. Constitution is difficult to amend. This is because it is a slave constitution. It was not designed to protect individuals — indeed, many of its authors owned individuals. It was designed to protect slavery specifically and the status quo generally. The design was successful. In two hundred years, citizenship rights have been extended by amendment only three times. No extensions were won by reason alone. All also required blood.

Women won voting rights after they volunteered for and served in the military (Navy) during World War I. Eighteen-year-old soldiers won voting rights for all eighteen-year-olds by dying in Vietnam. They did not die there for that purpose, but they did submit to an almost archetypal trial by ordeal and were then rewarded for doing so. And Amendments Fourteen and Fifteen, which established the rights of citizens regardless of "race, color, or previous condition of servitude," were the fruits of our Civil War. Deaths are a high price for success. One suspects that Equal Rights Amendment supporters did not look closely at past costs. Further, no one has (yet?) killed or died for the ERA, and I doubt many are prepared to do so. Still, blood may be the price of accepting rules which require so many majorities and which provide vetoes to minorities.

Few men have involved themselves in the ratification struggle except, of course, to cast nearly all the votes both for and against the amendment. Why is this the case? Equal rights affect men as well as women. Men have successfully litigated sex discrimination issues; indeed, in a decision written by Supreme Court Justice Sandra Day O'Connor, a young man won admission to a previously "women only" nursing school. Is it possible that men's lack of interest in the ERA stems from their lack of interest in the futile? Is it possible that their inactivity is a measure of the vanity or price of achieving ratification? If so, why are women assuming the burden of ratification? Why are they confirming suspicions about women's masochism (quite distinct from men's machoism)?

The Fourteenth Amendment specifically provides equal protection to "persons." Since women are certainly persons, why insist on a ratification ordeal? Why not assume and assert equality? Why not act equally? Why not ask that routine, everyday, ordinary, run-of-the-mill legislation be passed providing for enforcement of that equality? This is not the counsel of pragmatism, the recognition that majorities are easier to achieve than two-thirds and three-fourths votes. It is the counsel of principle — that women already are persons, citizens and equal, and as such are entitled to federal protection here, now, and by ordinary means.

If I were an opponent of women's rights and of women's participation in governance, I would encourage the commitment of their energies, their intelligence, and their funds to the ERA. I would encourage their diversion and sucker them into further commitment by referring to the importance of not losing. I would bait them as George Will baits them. I would say "your cause is not popular — last time you were only able to win in thirty-five states." Only? Thirty-five is seventy per cent! The veto provisions of our eighteenth-century Constitution have been outdone only once. That was by Poland's eighteenth-century constitutional monstrosity which gave a veto to each and every legislator.

I say, no more living fairy tales. No more manly ordeals. No more playing by unfair rules. No more asking male legislators for legitimacy. Women are legally equal. The Constitution affords us protection. The task now is enforcement. It is time for legislators (and also executives and administrators) to act. It is time for women to do ordinary politics. It is time to pass a federal Equal Rights Act which takes into account the effect of policies and which includes enforcement provisions. The South's attachment to states' rights may ultimately preclude passage of the ERA, and it may immediately cause filibusters in the Senate. Nevertheless, 1984 should be made the year of equal rights as 1964 was the year of civil rights.

By spending a decade on the ERA without securing ratification women gave ammunition to the enemy. We implied women were not already entitled. We raised the possibility that Americans do not want equal rights for women and men. We allowed the judiciary to delay a decisive verdict because the issue was being debated in another branch of government.

Now it is time for the valorous women who have already done so much to support the ERA to say: "We want and believe in the ERA but we see that state legislators need more education. We are going to provide that through federal legislation. We require the immediate enactment of an Equal Rights Act with enforcement provisions. This legislation is for all women and all men. In addition we seek the enactment of an equal rights legislative package designed to remedy the effect of current policies on certain women." The reason for the latter is to emphasize women's diversity — to show that while women support the concept of "equality," different concrete practices are needed to provide it to different women.

The political process deals with the specific and concrete. We cannot expect government to be attentive or responsive to persons and groups riding up glass mountains or seeking golden apples. It is more likely to respond to angry citizens engaged in everyday politics. I suspect women might do better being dragons than attempting to slay them.

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SOME DISCRIMINATIONS BASED ON SEX ARE VITAL TO SOCIETY

SAM J. ERVIN, JR.

The proposal by Professor Gayle Binion, of the University of California at Santa Barbara, that Congress enact an Equal Rights Act without awaiting the outcome of the efforts to add the Equal Rights Amendment to the Constitution is intriguing.

The proposed Equal Rights Act would establish federal standards for state laws conferring an equality of legal rights on all men and women, and invalidate state laws which fail to conform to the federal standards by design or in effect. The Act would offer federal funds to states for "de-gendering" their policies, and impose civil or criminal penalties on those which fail to bring their laws into compliance with the federal standards. Enforcement of the Act would focus on administrative action rather than litigation.

The proposal merits commendation for its originality. I, nevertheless, make these alternative predictions respecting it: first, Congress will not approve the proposed Equal Rights Act; and, second, the Supreme Court will adjudge the Act unconstitutional if Congress does pass it.

I discuss these predictions in their inverse order.

Professor Binion asserts that Congress is empowered by the legislative powers conferred on it by Article I of the original Constitution and the Equal Protection Clause of the Fourteenth Amendment to enact the proposed Equal Rights Act and "go beyond what the Equal Rights Amendment will do when it is finally ratified."

I challenge the validity of this assertion.

Sections 1 and 8 of Article I restrict the legislative powers of Congress to making laws necessary and proper "for carrying into execution" the powers delegated to it by the preceding provisions of the Article, and "all other powers vested by the Constitution in the government of the United States, or in any department or officer" of it.

In consequence, the power of Congress to legislate in respect to sexual equality is limited to legislation implementing activities the Constitution expressly or impliedly authorizes the federal government to carry out. Beyond that, Congress cannot go because all the remainder of this legislative field is reserved to the states by the Tenth Amendment.

Advocates of equal legal rights for women cannot achieve their goal under the Equal Protection Clause of the Fourteenth Amendment. While the clause forbids invidious discriminations against women, it sanctions state legal classifications based on sex if they serve important governmental objectives, and are substantially related to achievement of those objectives. Hence, the clause permits state laws which make reasonable distinctions between the legal rights of men and women because of the fundamental physiological differences between them, and the differing roles that men, on the one hand, and wives, mothers, widows, and children on the other, enact in life.

Professor Binion invokes the Voting Rights Act of 1965 as a precedent for believing that both Congress and the Supreme Court will approve the proposed Equal Rights Act. I disagree with this conclusion.

I do not share Professor Binion's enthusiasm for the Voting Rights Act. As a member of the United States Senate, I unsuccessfully opposed its enactment because of my abiding conviction that it violates the absolute constitutional prohibition against bills of attainder, the Fifth Amendment guaranty of due process, the four constitutional provisions vesting in or reserving to the states and denying to Congress the power to prescribe literacy tests and other qualifications for voting, and several other constitutional provisions. The Supreme Court decision adjudging it to be valid, I submit, is contemptuous of the Constitution.

My opinion, however, that the Voting Rights Act does not afford any assurance that Congress will enact the proposed Equal Rights Act is not based on these considerations. It is based solely on the dissimilarity of the two measures.

The Voting Rights Act is concerned with a single politically popular subject, the voting rights of blacks, and excludes from its drastic coverage all of the states except a few politically weak and carefully selected Southern states. For these reasons, it was not difficult for its advocates to persuade politically minded senators and representatives from states untouched by its drastic provisions to pass and subsequently renew the Voting Rights Act by huge majorities notwithstanding the act is a bill of attainder that condemns and punishes the areas covered by it without a judicial trial and without making any distinction between guilt and innocence, and operates through the agency of an artificial and irrefutable triggering device indifferent to truth and due process.

It will be otherwise, I predict, with respect to the proposed Equal Rights Act. It would apply without discrimination to all the states, and affect all state laws applicable to the rights, responsibilities, and relationships of the two sexes and the children they create.

Since it is quite dissimilar from the Voting Rights Act in the respects enumerated, the Supreme Court is not likely to succumb to the temptation to twist the Constitution awry to bestow an unmerited constitutional blessing upon the proposed Equal Rights Act even if Congress should enact it.

Professor Binion observes that we need the Equal

Rights Amendment "for philosophical and political reasons," but not for legal reasons.

If the Equal Rights Amendment is added to the Constitution, it will not be a philosophical or a political document. On the contrary, it will be an inexorable constitutional provision, which will nullify all prior inconsistent constitutional provisions, and all existing and future federal and state laws which base any legal right of any person in America on the circumstances that he or she is of one sex or the other. (See *Yale Law Journal* for April, 1971, pp. 889-893)

For this reason, America is in deep need of sound thinking respecting sex, discrimination between men and women, and the Equal Rights Amendment. Since it makes human life possible, sex is the most potent reality in the universe.

The constant misuse of the word discrimination has perverted it in the popular mind to a dirty word. To discriminate in its true sense is to recognize distinctions between persons or things. Discriminations between men and women may be created by law, or by the mores of society, or by nature.

The Equal Rights Amendment seeks to abolish all discriminations made by law between the legal rights of men and women. It is not concerned with discriminations made by the mores of society or nature. Indeed, it is powerless to alter them.

Delusions of advocates of the Equal Rights Amendment notwithstanding, all discriminations made by law between men and women are not unintelligent or invidious. On the contrary, many of them are highly intelligent and desirable, and must be preserved if the ways of life of Americans are to be preserved.

These are the discriminations which are designed by law to remedy harsh consequences of discriminations made by nature between men and women.

Despite the clamor of the advocates of the Equal Rights Amendment, nature does create significant discriminations between men and women.

While they are otherwise alike, there are fundamental physiological and functional discriminations between men and women. These discriminations are of supreme importance. They empower men to beget, and women to bear children; and thus perpetuate the existence of humanity on earth.

These discriminations have produced customs in living, and these customs have been implemented by highly intelligent and desirable laws which the Equal Rights Amendment seeks to nullify. These laws are based on these inescapable truths:

1. Man's role in the creative process is simple, temporary, and nondisabling; and woman's role in that process is difficult, protracted, burdensome, and at least temporarily disabling.
2. Children are God's most helpless creatures. They require years of physical, intellectual, and spiritual nurture to fit them for life as adults.

To ensure that women receive encouragement and assistance in the performance of their difficult, protracted, burdensome, and at least temporarily disabling role in the creative process, and that children receive the requisite physical, intellectual, and spiritual nurture, laws have created the institution of marriage, and assigned differing legal rights and responsibilities to men and women who marry in respect to themselves, their spouses, and the children they create.

These laws assign to husbands and fathers the legal responsibility to provide shelter, food, and other necessities of life for themselves, their spouses, and their children, and to wives and mothers the legal responsibility to make the shelter a home for themselves, their spouses, and their children, and to supply their children the essential nurture their infancy and early childhood require. The faithful performance of their respective legal responsibilities by married men and women is vital to the nurture, development, and advancement of the human race.

In addition to assigning these differing legal responsibilities to married men and women in respect to their marital affairs and relationships, the customs and laws exempt women from compulsory military service; impose on men the duty to defend the country when it is engaged in war with its enemies; and secure to widows a portion of their husbands' estates for their support after the deaths of their husbands.

Women may marry or refrain from marrying. Except to the extent it exempts all women from compulsory military and combat service, the enumerated laws do not apply to women who do not marry. Millions of women, however, deem marriage an acceptable way of life, and marry, become wives and mothers and widows. The laws afford substantial economic and legal protections to them and their children.

There are multitudes of other laws, however, based on the circumstance that the persons to whom they apply belong to one sex or the other.

Most of the supporters of the Equal Rights Amendment support it because they think it will simply abolish unintelligent and invidious discriminations made by law against women. They are grossly mistaken. Virtually all unintelligent and invidious discriminations made by law against women have already been abolished.

The Equal Rights Amendment specifies in Section 1 that "equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." These beguiling words declare that sex, the most potent reality in the universe, must be ignored by Congress and the fifty States when they make laws. They forbid Congress and the fifty States to make any law applicable to any person because such person is of one sex or the other. Hence, the amendment is irrational, and unrealistic, and contrary to the way of life America has always known.

For their own good and that of posterity, Americans must not be deluded by the beguiling appeal or the deceitful power of the siren words "equality of rights under the law" or by the many misinterpretations of those words by the advocates of the Equal Rights Amendment.

If it is added to the Constitution, the amendment will nullify the intelligent and desirable laws I have detailed and all other federal and state laws making legal distinctions between men and women and boys and girls, no matter how necessary and sensible such distinctions may be, and rob Congress and the fifty states of the constitutional power to enact any similar laws in the future.

Moreover, the amendment, if ratified, will be highly destructive of the federal system of government the Constitution was ordained to establish because it will transfer from the legislatures and courts of the fifty states to Congress and the United States Supreme Court the ultimate legislative and judicial power over all laws relating to the legal rights and responsibilities of men and women to themselves, each other, and the children they create.

Among the multitudes of laws the amendment will nullify because they are based on the sex of the persons to whom they apply are the following:

1. Laws which grant women special rights and special economic protections because they are wives, mothers, or widows.

2. Laws which impose on husbands and fathers obligations to provide a home, food, and the other necessities of life for their wives and children.

3. Laws which require men to pay alimony to their wives or former wives.

4. Laws which ensure privacy to men and women, and boys and girls, by requiring separate rest rooms in schools, and public, commercial, and industrial buildings.

5. Laws which permit segregation by sex in educational institutions or hospitals, or require segregation by sex in jails or prisons.

6. Laws which exempt women and girls from compulsory military service or from service in combat units of the armed forces in time of war.

7. Laws which define as criminal such acts as forcible rape, carnal knowledge of innocent and virtuous girls under the age of consent, and seduction of innocent and virtuous women under promises of marriage, acts which can be committed only by men.

8. Laws which make the right to marry depend on the contracting parties being persons of different sexes rather than two male homosexuals or two female lesbians.

Sam J. Ervin, Jr., is the former Senator from North Carolina (1954-1974) and a former Justice of the North Carolina Supreme Court (1948-1954).

THE AMENDMENT WOULD ENSURE LONG-TERM STRUCTURAL CHANGE

GERALDINE A. FERRARO

I find myself in the somewhat uncomfortable position of agreeing with many of the points Dr. Binion makes in her article but disagreeing, strongly, with her bottom-line conclusion — that we should put the Equal Rights Amendment on a back burner and instead press forward with passage of an Equal Rights Act.

Yes, we need the Twenty-seventh Amendment for philosophical and political reasons, as Dr. Binion states. I believe these reasons are even more important than Dr. Binion thinks they are. And, I believe we need the ERA — the Amendment, not just the Act — for legal reasons as well.

The history of women in this country has not been a steady parade of progress but rather a cycle of boom and bust. Women's rights and freedoms, far more than those of America's racial and ethnic minorities, are at the mercy of the national mood and economic condition. Let us not forget how, after World War II, women were pushed back into the home, demoted from Rosie the Riveter to Split-Level Sally. I remember all too clearly my own experience as a woman in law school in the late nineteen-fifties. One of only two women in my class, I was reminded that I was taking a man's place.

It really wasn't until 1970 that women began regaining the ground they had lost and claiming new rights in government, finance, the arts, the family, and the workplace.

The future of the woman's movement is unclear. On the one hand, we have the gender gap — an outgrowth of women's new assertiveness in the economy and the voting booth.

On the other hand, there are some disturbing signs of backlash. The President blames women for high unemployment rates; the New Right advances a so-called Family Protection Act; and some young women deny the validity and value of the women's movement.

We need a constitutional statement — an Equal Rights Amendment — to serve as a bedrock upon which women's rights can be permanently planted.

Dr. Binion points out that our Constitution has been able to stretch to accommodate such new-fangled contrivances as wiretaps and automobiles. Unlike this new technology, however, women existed in the eighteenth century, as they do now, and they were explicitly and deliberately *not* recognized by the men who framed our Constitution.

If the Fourteenth Amendment so clearly applied to women, why did it take fifty-two years after its ratification for women to win, by constitutional amendment, the right to vote? And how much longer will women have to wait for the courts, as Dr. Binion puts it, to "recognize the full extent of this protection"?

Certainly an Equal Rights Act would be easier to enact than a constitutional amendment. But ease of passage is no real advantage if what is passed fails to assure the kind of long-term structural change which the Twenty-seventh Amendment would provide.

Admittedly, supporters of the ERA in Congress have seemed all too willing to cede to the courts the responsibility for administering the amendment. In this connection, Dr. Binion's suggestions for an Equal Rights Act — but as a companion to, not a substitute for, the EPA — are both timely and valuable.

The author is absolutely right that intentional discrimination is only part, a small part, of the problem women face.

In my own work on the federal budget and in the area of pension reform, it is clear that the very surface neutrality of these issues obscures the ways in which women are more seriously affected than men are. Dr. Binion's proposal that "governments consider the impact of policies and legislation on women" is an excellent one that could be implemented legislatively.

Although I cannot quite imagine teams of federal "de-genderizers" spreading out across the land, the idea of specific and enforceable effects tests and compliance standards is also a very useful one.

Congress is *not* waiting for passage and ratification of the ERA to proceed with an agenda for legislative change regarding the role and rights of women. This agenda includes the Economic Equity Act and Title IX of the Education Act and Title VII of the Civil Rights Act and the twenty-year-old Equal Pay Act. The Equity Act is omnibus legislation designed to address some specific problems women face in our economy, due both to innate and overt discrimination. In fact, the Equity Act was originally conceived as implementing legislation for the Equal Rights Amendment.

So while we are not standing still, the supporters of the Equal Rights *Amendment* still feel we must proceed with the ERA as the ultimate assurance that women's rights will be forever recognized in the Constitution and laws of the United States.

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INTENT RATHER THAN 'DISPARATE IMPACT' SHOULD BE THE TEST

ORRIN G. HATCH

While I share Dr. Binion's views that there are important objectives that could be served by further legislative initiatives in the area of women's rights, I would strongly disagree with much of what she writes in defense of her proposed Equal Rights Act. In particular, I would take issue with her recommendation that such an Act ought to incorporate the "disparate impact" conception of discrimination that she correctly observes was incorporated last year into the Voting Rights Act.

As I indicated at the time of the debate accompanying the Voting Rights Act, I believe that the "disparate impact" standard (or the "results" standard) represents a perversion of the traditional understanding of what constitutes "discrimination." The "disparate impact" standard, relying primarily upon tools of statistical analysis, seems to assume that in the absence of invidious discrimination, society would be arranged according to neat and precise racial and ethnic proportions — in colleges and universities, in employment positions, and in neighborhoods. Instead of focusing upon the intent or motivation behind some allegedly discriminatory action, the "disparate impact" standard focuses principally upon whether racial and ethnic groups of various types are properly arranged in a form of social checkerboard.

In the context of the Voting Rights Act, I believe that the "disparate impact" test will eventually outlaw a large number of neutral, color-blind policies that were never conceived with any discriminatory purpose — at-large elections, registration updating, run-off elections, and so forth. At the same time, its principal contribution will be to involve the federal judiciary, unelected and unaccountable, far more deeply in the affair of states and municipalities in determining forms of self-government.

In the area of the "Equal Rights Act" (as described by Dr. Binion), I believe that the "disparate impact" test would be similarly misguided. To give an example: many states have adopted civil service hiring policies under which veterans are given "points" or a slight preference in hiring. Under the traditional "intent" standard of discrimination, these policies have been upheld by the Supreme Court because they are not designed to be discriminate against women. (*Massachusetts v. Feeney*, 442 U.S. 256 [1979]). Challenges by feminist groups have been mounted to such statutes on "disparate impact" grounds because more veterans are men than are women. Under the "disparate impact" test, it matters little that there may have been neutral and nondiscriminatory purposes behind a statute; what matters principally is that the races or the ethnic groups or the sexes are not apportioned in every social compartment in exactly the ratio that the group exists in the population.

Under a "disparate impact" standard, veteran-preference laws would have to fall, as would countless other laws that one feminist litigating organization or another would argue had a differential impact upon women. These would include laws limiting public funding for abortions, physical standards for such public employment as the military, police, and fire fighters, domestic relations laws, laws upholding seniority systems, prostitution laws, and so forth. The California Commission on the Effects of the ERA has argued, for example, that continuation of the "fault" concept in alimony or maintenance awards might be unconstitutional under the Equal Rights Amendment because of its "disparate impact" upon women.

Rather than focusing upon genuine exercises of discrimination against women, and laws which draw arbitrary distinctions in treatment, Dr. Binion would transform the equal rights effort into something radically different. In the process, she would forfeit the consensus that exists in this country in behalf of equal legal treatment for women, and in behalf of ensuring that no woman is denied an opportunity to realize her full potential in society. Dr. Binion is no longer talking about equal opportunity for women; she is talking about equal outcome.

Orrin G. Hatch is the Republican Senator from Utah and a member of several Senate committees, including the Judiciary and Labor and Human Resources Committees.

THE AMENDMENT MUST COME BEFORE, NOT AFTER, A RIGHTS ACT

JUDITH I. AVNER

Although I share Gayle Binion's eagerness that a legal guarantee of gender equality arrive earlier than later, I disagree that an Equal Rights Act is superior to the Equal Rights Amendment as the appropriate vehicle. Indeed, I see in such an act none of the virtues cited by Binion as a substitute for a clear and permanent statement in the United States Constitution — the basic document that describes this nation's fundamental principles.

Binion's analogy to the Voting Rights Act puts the cart before the horse. The strength and success of the Voting Rights Act (and I agree that it is one of the strongest pieces of civil rights legislation) derives from its constitutional grounding. The Act came into existence to assure implementation by recalcitrant legislatures of the civil rights amendments to the Constitution, particularly the Fifteenth (and presumably Nineteenth) Amendment guaranteeing the right to vote. To suggest that an Equal Rights Act could be modeled on the Voting Rights Act without first providing the constitutional base so critical to the latter's effectiveness is to ignore the historical lesson of the Voting Rights Act: that constitutional direction must be present before state and federal legislatures take seriously an anti-discrimination mandate.

Similarly, Binion's discussion of the Fourteenth Amendment mistakenly minimizes the serious limitations on the utility of this existing constitutional provision to combat sex discrimination. Intended as a tool to eradicate race discrimination, the Fourteenth Amendment has never been interpreted by the Supreme Court to afford women full protection from sex discrimination. True, it has provided a vehicle for reaching some overt sex discrimination. Yet, the Court, in its most recent Fourteenth Amendment pronouncement, *Mississippi University for Women v. Hogan*, made clear the outer limit of the amendment's application to sex discrimination. The Court settled comfortably on a "middle level" of scrutiny, requiring some governmental justification to uphold sex-based discrimination, but not the same compelling justification required in race and national origin cases. The ERA would assure a level of review at least as stringent as that required in race discrimination cases, and perhaps even more stringent, prohibiting absolutely discrimination based on sex unless a physical characteristic unique to one sex is the basis of the challenged classification.

Binion's Fourth Amendment analogy is similarly unpersuasive. Unlike wiretaps and automobiles, women were in existence when the Constitution was written. Binion overlooks the significant differences between extending the scope of an amendment to meet new technological developments and extending it to embrace a group deliberately excluded from constitutional protection.

Actions of the current Administration and Congress remove any doubt that only the relative permanence of a constitutional guarantee of equality will preserve this principle even in the face of changing political winds. For example, attempts by the Administration and Congress to gut the provisions of Title VII of the Civil Rights Act of 1964 (prohibiting discrimination in employment) and Title IX of the Education Amendments of 1972 (prohibiting discrimination in education) through weakening amendments, half-hearted enforcement, and urging the courts to adopt restrictive readings of these antidiscrimination statutes, dramatically illustrate the shortcomings of a statute. The constitutional dimension of the ERA is an essential barrier to politically motivated retreats from the effort to eradicate discrimination.

In addition, the ERA is not burdened by the Supreme Court's interpretation of the Fourteenth Amendment as requiring a showing of discriminatory intent in challenging a facially neutral policy that has a disproportionate impact on a protected class (*Washington v. Davis*). Thus the ERA is an effective means to reach the more subtle forms of discrimination that continue to deprive women of equality.

The experience of the sixteen states which already have equal rights amendments in their constitutions demonstrates the value and importance of the ERA. Court decisions and legislation grounded on state ERAs have resulted in extension to both women and men of rights and responsibilities formerly allocated to one sex alone. Moreover, state ERAs provided the impetus for extensive legislative reform of many state codes, thereby reducing the need to litigate.

Consistent with established precepts of federalism, the ERA's two-year grace period, admittedly a frustrating delay in achieving equality, gives state legislatures the necessary lead time to review and revise their codes to comply with the ERA's mandate. Subsequent litigation or federal intervention would occur if a legislature chooses to ignore the constitutional directive.

Ratification of the ERA is essential to achieve a national standard of equality for women and men. Working for passage of an act would divert energy from the effort to ratify the ERA, which Binion agrees is ultimately necessary. The fundamental guarantee of equal rights embodied in the Amendment belongs in the United States Constitution. The women and men of this country deserve no less than this secure, constitutional guarantee of equal dignity under law.

Judith Avner is a staff attorney of the Legal Defense and Education Fund of the National Organization for Women in New York. She is the co-director of the ERA Impact Project and has actively worked for ratification of the Equal Rights Amendment.

AFTERWORD

I appreciate the interesting and thoughtful comments by those who have responded to my argument in support of an Equal Rights Act. I find little with which to disagree in the comments of Professor Stiehm and Representative Ferraro. I am also grateful for the efforts of Ms. Ferraro on behalf of feminist legislation and her continuing vigilance against regressive backlash. While I fully respect Ferraro's "bottom line" preference for a constitutional amendment, I still believe that we will not see this change for many years, and we will then still need an Equal Rights Act. My "bottom line" is that we probably have lost nothing, and have gained much, by reversing the order of priority.

Senators Hatch and Ervin and Ms. Avner offer more substantive criticisms of my argument in support of an Equal Rights Act. I turn first to the comments of Senator Hatch. He appears to share my view that Congress *may* use an *impact* standard for discrimination (on the basis of sex) as it has done in the Voting Rights Act. He simply finds this "misguided" and prefers an *intent* standard whereby the Constitution is violated only when government has intended to disadvantage the race, class, etc., that has been harmed by the law in question. His preference for an *intent* approach to equal protection is based on what I view as three unpersuasive propositions. First, he asserts that the traditional standard of equal protection was an *intent* standard. While this has become fashionable in the Burger Court during the past decade, my forthcoming article in *The Supreme Court Review 1983* provides substantial evidence that *intent* is not the appropriate test for a violation of equal protection. (Suffice it to note that the most important seminal civil rights decision, *Brown v. Board of Education* [1954], was decided entirely on the *impact* of segregation on black schoolchildren. The Court found nothing inherently unconstitutional about segregation per se.)

Senator Hatch's second objection to an *impact* standard is due to his assumption that it would require government to "properly arrange" racial, gender, and ethnic groups. This is the most common objection to an *impact* test for discrimination, but is simply not true. All that an *impact* standard — as I define it — will do is prohibit government from unnecessarily restricting the freedom of individual women to arrange themselves.

Finally, Senator Hatch refers to a preference for equality of opportunity rather than an equality of results. The two are not unrelated. My approach to sexual equality asks whether an inequality of results (such as in obtaining public employment) *is due to* an inequality of opportunity because the government's criteria of selection have unnecessarily restricted opportunities for women. To me it is constitutionally irrelevant whether these opportunity-restricting criteria were adopted in order to disadvantage women. If they have that effect, and they are not essential to the effectuation of important public policy, they ought to be illegal.

In contrast with the comments of Senator Hatch, the responses of Senator Ervin and Ms. Avner suggest that I have overstated the authority of the Fourteenth Amendment as a prohibition on sex discrimination. Senator Ervin's perspective reflects his commitment to the vitality of the Tenth Amendment as a bulwark against the power of the federal government over the states. He therefore finds even the Voting Rights Act to be unconstitutional. His "states' rights" view of the U.S. Constitution, based on his reading of the intentions of the framers, finds little authority in the case law of the past forty-five years. Ms. Avner's suggestion, however, that the Fourteenth Amendment does not empower Congress to pass the kind of legislation that I propose represents a misreading of relevant case law. Her argument confuses the self-enforcing equal protection clause with congressional authority under Section 5 of the Fourteenth Amendment. The fact that the U.S. Supreme Court will not, on its own, read the Fourteenth Amendment as rendering sex a "suspect classification" and will not decide sex discrimination cases under an *impact* standard, does not mean that it would not uphold the power of Congress to do so under Section 5. Congress has already been given sufficient judicial support for its legislative authority to combat sex discrimination, even against state government. I believe that the courts would simply defer to a congressional decision to extend — not reverse — their decisions on sexual equality. In sum, as I demonstrate in my article, the Fourteenth Amendment has clearly been applied to women, just not sufficiently so by the courts. The constitutional foundation does exist for an Equal Rights Act; the analogy to the Voting Rights Act is apt.

What particularly troubles me about Ms. Avner's argument is not her impression that the courts would not uphold an Equal Rights Act but rather her belief that the Fourteenth Amendment does not cover women. As Professor Stiehm has observed, the equal protection clause refers to "persons"; are women not "persons"? True, women did exist when the Fourteenth Amendment was passed and no specific mention was made of us, but doesn't the Constitution adapt to changing *social ideas* and *values* just as it must adapt to changing technology? If we posit that the framers of the Fourteenth Amendment would have agreed with the Court's decision in *Plessy v. Ferguson* (1896), upholding "separate but equal" with respect to race, would Ms. Avner reject the subsequent constitutional validity of *Brown v. Board of Education?* And, the framers of the Fourteenth Amendment, unlike the framers of the original Constitution, had enough knowledge of judicial review to have expected that the judiciary would interpret its meaning in future years.

Two other points in Ms. Avner's response are also not persuasive. Her assumption that the Equal Rights Amendment, unlike the Fourteenth Amendment, will not require a test of *intent* to discriminate, and will, therefore, reach discriminatory impacts, ignores the plain language of the Amendment. As I argue in my article, the term "on account of sex" clearly invites intent analysis. Finally, while I appreciate the effectiveness of *some* states' ERAs, I must also point out that the legal effect on the states of a federal statute is identical to the effect of a federal constitutional amendment. If state law contravenes either, the supremacy clause of the U.S. Constitution states that the federal law takes precedence.

The responses to my suggestion of a comprehensive federal Equal Rights Act represent a wide range of views and suggest the complexities of our legal system. While there are clearly questions involving prediction (Will the Congress pass the Equal Rights Amendment? Will the drive for an Equal Rights Act "derail" the movement for a constitutional amendment?), I remain convinced that Congress does have the constitutional authority to pass such an Act. I also remain convinced that the benefits of such an Act outweigh its potential — although remote — liabilities.

— GAYLE BINION

The Effect of Section 2

by

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Section 1. "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

Section 2. "The Congress shall have the power to enforce by appropriate legislation the provisions of this article."

Section 3. "This Amendment shall take effect two years after the date of ratification."

Those three sections constitute the full wording of the proposed 27th Amendment to the Constitution.

This year we celebrate the Bicentennial Anniversary of the United States, a constitutional republic. The original 13 states have grown to 50. These states are separate, sovereign entities banded together as stated in the Preamble to the Constitution:

> ". . . in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity . . ."

Our nation has prospered and grown powerful. Our people have more personal freedom coupled with more economic opportunities than any people have had in all history. Because we so cherish our own liberty we have used our power to help people in other lands secure theirs. This treasuring of freedom is our heritage, handed down by our forefathers, who knew what it meant not to have liberty.

Our nation's founders shrewdly devised a Constitution designed to preserve the freedom from tyranny for which they had fought. They set up three branches of government, each with separately defined powers -- thus providing a system of checks and balances that would allow each branch to operate autonomously without being dominated by the other two. But even with this protection written into the Constitution the Founding Fathers wouldn't accept the instrument until further guarantees of liberty were added in the form of the Bill of Rights, the first 10 amendments to the Constitution.

The 10th Amendment in this Bill of Rights provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

This means that the states *may* give power, through the Congress, to the Federal Government. But if the states did not grant to the Federal Government any more power, the Federal Government could not, on its own, assume more power.

Outright Grant of Power

ERA's Section 2 is an outright grant of power to the Federal Government, allowing it to exercise more control over our personal lives. Section 2 allows state legislatures to hand over to Congress the power to pass all laws relating to the sexes and the relationship between the sexes. This includes laws concerning divorce, inheritance, sex crimes and even building codes. Hidden within this seemingly beneficent little amendment is a rip-off of state's rights -- a sellout of a part of our liberty.

United States Senator Sam Ervin of North Carolina is one of the most respected constitutional lawyers in America. He has said that the effect of Section 2 of this amendment is that ". . . it will come near to abolishing the states of this union as viable governmental bodies . . . it will virtually reduce the states of this union to meaningless zeroes on the Nation's map . . . It will transfer virtually all the legislative power of government from the states to Congress . . . Not only that, the Federal system which contemplates an indestructible union composed of indestructible states, as it is now established by all the provisions of the Constitution, will be substantially destroyed. . . ."

A great majority of informed lawyers agree with him. They see the Amendment as another step toward losing their liberty; as another step toward the establishment of more Federal bureaus, more Federal courts, more Federal police, and more Federal taxes.

Thoughtful persons are taking steps to stop the ratification of this amendment because they cherish their American Heritage; because they fear the abolishment of the states and the establishing of one all-powerful, centralized Federal Government in Washington, D.C.

They believe that the best government is that government which is closest to the people, and in which the legislative representatives are in close contact with their constituents. It is not only the best government, but is the government most likely to preserve the liberty of the people.

It Was Planned That Way

It is no accident that Section 2 of the ERA takes the power to enforce the Amendment by appropriate legislation away from the states and gives it to the Federal Government -- it was planned that way. The Amendment was sent out to the states for approval by Congress. (You will notice that I did not say "approved by Congress" because many Congressmen who voted to send the Amendment to the states for approval said at the time that they did not think it was necessary, or said they disagreed with it, but they wanted to get the lobbyists for the Amendment "off their backs" in order to turn their attention to other matters).

Until 1970, Section 2 of the Amendment had provided that,

> "Congress *and the States* should have the power to enforce by appropriate legislation the provisions of this article."

However, certain persons who desired change in the form of our government and wanted more power placed in the hands of the Federal government, had Section 2 of the Amendment changed to eliminate any question that the states would have any right to enforce the Amendment. They saw that by changing the wording, the ERA could be used as a vehicle to grab more power for the Federal Government. They saw that ERA could help turn the government of the United States into a centralized, Federal form of government with little or no governmental powers remaining to the individual states.

The individuals and the women's groups that had been pushing for ratification of ERA in one form or another for 47 years were so grateful for assistance in their battle, they did not question the motives of the persons who helped get ERA out of Congress. They did not ask who changed the wording of Section 2, why it was so changed, or what the effect of the change would be. Naively accepting the help, they believed that they had achieved a victory in getting the ERA out of committees and onto the floor of Congress within a matter of a few days, and then out to the states for approval. They did not realize they were being used as unwitting dupes by those persons who believe that, in essense, the state legislatures should be abolished and all legislative power placed in Congress. Such persons want to convert our form of government into a centralized government.

Katzenbach v. Morgan

Some persons see no harm in handing over to the Federal courts, by way of Amendments to the Constitution, the power to establish the public policy through interpretation of the effect of the provisions of any amendment added to the Constitution.

To cite a precedent to prove this, consider: Section 5 of the 14th Amendment to the Constitution contains the *exact* same language of Section 2 of the ERA.

We don't have to guess what the effect of Section 2 will be because the courts already have said that these words are an outright grant of power to Congress to pass all laws to enforce the Amendment - and even if the states have passed legislation to enforce it, state legislation means nothing if Congress passes other laws. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Worse yet, laws passed by Congress may be nulled by the Federal courts because once a Constitutional question is involved, the courts, and not Congress, determine what the law should be. We have seen the courts determine what public policy should be when they interpreted civil rights under the 14th Amendment. In applying the effect of this Amendment, the courts have assumed jurisdiction to declare that there should be no school-prescribed prayers, that the courts shall set local school district limits, that students should be bused away from schools which their parents have expended extra tax money to provide for them, and that abortion should be legalized (despite state laws). This authority over grass-roots matters is given to the Federal courts and the Supreme Court of the United States because of the broad grant of power in Section 5 of the 14th Amendment (which has language identical to Section 2 of ERA). When a constitutional question is involved, judges not legislators decide what the law should be and what the public policy should be.

Virginia Task Force Report

Because of all the emotional arguments which proponents (and some opponents) of ERA were making before the Virginia Legislature, and because of the confusion in the minds of the legislators as to what part of the arguments were fact, what part of the arguments were fiction, and what part of the arguments were pure emotion, the Virginia Legislature authorized a study to be made over a period of time by a committee composed of some of the most prominent lawyers in Virginia.

For the most part, the lawyers, when appointed to the committee were in favor of the Amendment. However, after months of study and research, the Committee reported back to the Virginia Legislature their findings as to the effect of this Amendment, including Section 2. As a result, the Virginia Legislature refused to ratify the Amendment. Since that time, the Amendment was again offered to the Virginia Legislature for consideration this year, and again, the Virginia Legislature (along with 15 other states) refused to approve it. To my knowledge, the study by the Virginia Task Force is the only independent, objective study by a group of lawyers commissioned for that purpose. For this reason, it is very important and should carry much weight.

Even if the ERA would solve all of the many problems which sincere, but uninformed, proponents of the ERA mistakenly believe it would solve; even if it had all of the virtues claimed for it, it also is cursed with Section 2 which is designed to change our American form of government.

The two parts of the Amendment are inseparable -- it must be accepted by the states in exactly the same form in which it was passed on to the states by Congress -- there is no taking of the good and eliminating the bad -- *it is all or nothing at all.* It is for this reason that educated and informed state legislators are turning "thumbs down" on the ERA. It is for this reason that I ask you to turn "thumbs down" on the ERA.

ERA's Section 2: Federal Power Grab

> ***"The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."***

Section 2 of the Equal Rights Amendment would be a tremendous grant of power from the states to the Federal Government—a power greater than the Commerce Clause, the Necessary and Proper Clause, or any other grant of power in the U.S. Constitution.

Section 1 of ERA would require every Federal and state law to be sex-neutral; but Section 2 of ERA would transfer from the states to the Federal Government the final decision-making power over all those areas of state law which have traditionally made differences of treatment on account of sex. The areas of state law which would be shifted from the states to the Federal Government would include:

Marriage and marriage property laws
Child custody and adoptions
Divorce and alimony
Abortion
Homosexual laws
Sexual crimes
Private and Public Schools
School sports
Protective labor laws
Prison regulations
Public accommodations
Insurance rates

Former Senator Sam J. Ervin, Jr., long considered the dean of lawyers in the U.S. Senate, testified before the North Carolina General Assembly on January 24, 1977:

> ***"If it is ratified, the Equal Rights Amendment will transfer from the States to the Federal Government vast governmental powers which have been reserved to the States throughout our history. By so doing, the Amendment will substantially thwart the purpose of the Constitution to create 'an indestructible union composed of indestructible States' and reduce the States in large measure to powerless zeroes on the nation's map."***

In the last several decades, many powers have shifted from the states to the Federal Government. Whether or not one agrees with past shifts of power, it is difficult to see how the cause of justice or freedom would be enhanced by a massive additional shift of power from the states to the Federal Government over the areas of law listed above. Senator Ervin continued in his 1977 testimony:

> ***"The chief governmental power reserved to the States by the Constitution has been the power to make the laws governing the rights and responsibilities of the men and women living within their respective borders.***
>
> ***"By virtue of this reserved power, the States have made throughout our history the laws regulating marriage, the support of the family, the property rights of married people, the care and custody of children, divorce, alimony, and the myriad other aspects of relationship between men and women. . . .***
>
> ***"Moreover, the power to interpret laws of this nature has resided in the state courts whose rulings concerning them have been exempt from reversal by the Supreme Court of the United States except in those comparatively rare instances where such laws deny individuals the equal protection of the laws or deprive them of due process of law in violation of the Fourteenth Amendment.***
>
> ***"While its advocates may not so intend, all of these things will be drastically changed if the Equal Rights Amendment should be ratified. This is true because the Equal Rights Amendment will convert the States from sovereign authorities in the constitutional field now assigned to them into rather meaningless zeroes on the nation's map."***

Enforcement Clause History

The reason we can reliably predict how great is the power of ERA's Section 2 is that our country has had more than a century of Supreme Court interpretation of that identical enforcement clause which appears in the 13th, 14th, and 15th Amendments. The enforcement clause enables Congress and the Federal courts to invalidate laws and private actions that were not prohibited by Section 1 of the Amendments.

For the first hundred years of experience with the enforcement clauses of these Amendments, these clauses were narrowly construed to authorize only "remedial" Federal action when the states had failed to take action to protect the rights of their citizens under Section 1 of those Amendments. However, in the era of civil rights legislation starting in the 1960s, the Supreme Court decided that the word "appropriate" in the enforcement clauses means that Congress and the courts can do anything that is "relevant," even if it displaces state powers specifically reserved to the states by the express language of the U.S. Constitution.[1]

A study of Congressional legislation and Supreme Court decisions under the enforcement clauses of the 13th, 14th, and 15th Amendments (which are identical to the enforcement clause of ERA), teaches us that these enforcement clauses transfer the following powers from the states to the Federal Government:

1) to Congress and the Federal courts, the power to regulate actions among private individuals, such as the private sales of real estate[2] and admissions to private schools;[3]

2) to Congress and the Federal courts, the power to define a political/social goal and then take any relevant means to achieve it, no matter how discriminatory the laws and procedures required to attain it;[4]

3) to Congress and the Federal courts, the power to knock out state laws based on their political/social *effect* rather than on their wording, intent, or purpose;

4) to Congress, the power to preempt state law, that is, to substitute Federal law for state law even though state law is admittedly constitutional and even though the state law concerns a subject which the Constitution specifically reserved to state (rather than Federal) control;

5) to the Congress, the Federal bureaucracy and the Federal courts, the power to enforce laws that are discriminatory in both intent and effect, that is, laws which are deliberately designed to impose different procedures and penalties on various states;

6) to the U.S. Justice Department, the power to monitor, veto, and delay changes in state laws pertaining to particular subjects;

7) to Congress, the power to set up a triggering device that automatically prevents states from establishing their own regulations in certain areas which the Constitution specifically reserved to state (rather than Federal) control;

8) to the Federal courts, the power to approve and enforce all the above.

ERA Enforcement Clause

The Equal Rights Amendment was born of the era of the Nineteenth Amendment. Three years after the women's suffrage was ratified in 1920, the first version of the Equal Right[illegible]endment was proposed by an organization cal[illegible] Women's Party. Section 1 then had language [illegible] to the version finally passed by Congress in [illegible] Section 2 was significantly different: "Congress [illegible] *the several states* shall have power, *within their respective jurisdictions*, to enforce this article by appropriate legislation." The emphasized words were deleted before final passage in 1972.

Section 2 of ERA would give Congress the same broad affirmative power to enforce the mandate of Section 1 as the enforcement clauses of the 13th, 14th, and 15th Amendments. In addition, the open-ended language and the far broader subject-matter of ERA would provide opportunities for endless litigation and interpretation, as well as granting an even broader enforcement power to Congress and the courts.

Katzenbach v. Morgan is the authority for interpreting Section 2 of ERA to give Congress both the power to preempt state laws which are otherwise completely constitutional, plus the power to write its own definition of the rights covered by Section 1. Furthermore, under *Morgan*, Congress could even legislate to define certain acts as a denial of sex equality after the Court has previously held the contrary.

Using Section 2 of ERA

Here are some examples of how the vast Section 2 power of ERA could be used:

1) ERA lawyers will argue that ERA makes family law a Federal matter. The publication entitled *Sex Bias in the U.S. Code*, written by ERA lawyer Ruth Bader Ginsburg and published by the U.S. Commission on Civil Rights, states that the concept of breadwinning husband and homemaking wife "must be eliminated from the Code if it is to reflect the equality principle."[5] This report also states that "no-fault divorce" should be adopted nationally.[6]

2) ERA lawyers will argue that ERA will impose the *duty* on Congress to set up and to finance child-care centers for *all* children, regardless of need. The ERA mandate for government-financed child-care comes from the "equality principle" of Section 1, as affirmatively enforced by Section 2. *Sex Bias in the U.S. Code* states that, in order to achieve the "equality principle" of ERA, "the increasingly common two-earner family pattern should impel development of a comprehensive program of government-supported child care."[7] The Governor of Ohio set up a Task Force for the Implementation of the Equal Rights Amendment in 1975, which concluded:

> ***"The equality principle embodied in the ERA requires consideration of a new public policy on the issue of child care. Women who are mothers need to enjoy the same freedoms and opportunities as men who are fathers . . . UNIVERSALLY AVAILABLE—Quality child care must be available to all families who need such services irrespective of their income level."[8]***

3) ERA lawyers will try to bring about a restructuring of Social Security in order to force the full-time homemaker (the dependent-wife) to pay a double Social Security tax in order to receive the same retirement benefit which the System has paid to homemakers for the past 40 years. This radical notion was set forth in a Federal Government document called *Social Security and the Changing Roles of Men and Women* published in 1979, which recommended three options to change the System, of which one was the Homemaker's Tax. Under this recommendation, the Federal Government would set "a specific dollar value for work performed in the home . . . [and then] require homemakers to pay Social Security taxes on the imputed value of their services."[9] The financial columnist, Sylvia Porter, is one of those who have argued that, "If some change along these lines is not enacted sooner, the Equal Rights Amendment, when finally passed, will require it."[10]

References:

1. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).
2. *Jones v. Alfred H. Mayer Company*, 392 U.S. 409 (1968).
3. *Runyon v. McCrary*, 427 U.S. 160 (1976).
4. Voting Rights Acts.
5. *Sex Bias in the U.S. Code*, April 1977, p. 206.
6. *Ibid.*, p. 159.
7. *Ibid.*, p. 214.
8. A Report by the Ohio Task Force for the Implementation of the Equal Rights Amendment, published by the State of Ohio, July 1975, pp. 17-20.
9. *Social Security and the Changing Roles of Men and Women*, published by the U.S. Department of Health, Education, and Welfare, Feb. 1979, p. 105.
10. Syndicated column, April 9, 1975.

A Lawyer Looks at the EQUAL RIGHTS AMENDMENT

Rex E. Lee

11

Should ERA Become Part of the Constitution?

The decade of the 1970s witnessed intense national debate over whether the Equal Rights Amendment is in our interest. The central feature of the debate has been confident but conflicting assertions by both sides concerning the effects of the ERA if it becomes part of the Constitution. All the congressional testimony and reports favoring the Equal Rights Amendment assert that it would not invalidate laws prohibiting homosexual relations, intersexual occupancy of sleeping facilities in public institutions, or forcible rape. Opponents of the amendment are equally convinced that these results would occur. Concerning the mandatory use of women in combat, even the proponents are in disagreement.

Both sides in this debate have missed the point. Neither during the present preratification period nor, if ratified, for decades after can anyone on this planet know what the ERA will mean. The most important question is the standard of judicial review: judicial scrutiny, strict judicial scrutiny, qualified absolutism, or something else. No one knows what that standard will be. My own best judgment is that it will be either a strict judicial scrutiny or qualified absolutist approach, which would move the standard from point A on the continuum (Diagram F) to either point B or point C. A solid argument can be made, however, for moving it all the way to point D.

Moreover, even after the standard is identified, uncertainties will still exist. The qualified absolutists contend that laws prohibiting forcible rape, homosexual conduct, and coeducational dormitories for single people will be saved by their two qualifications. I am equally convinced that laws prohibiting homosexual conduct and coeducational dorms are inconsistent with that standard. The only hope for those laws would be to persuade the courts either to adopt something other than an absolutist approach or to ignore the doctrinal underpinnings of absolutism. In the face of that kind of uncertainty, how is the conscientious citizen to make a choice?

For a few people, the answer will be easy because there are no horribles in the parade. Constitutional legalization of homosexual conduct

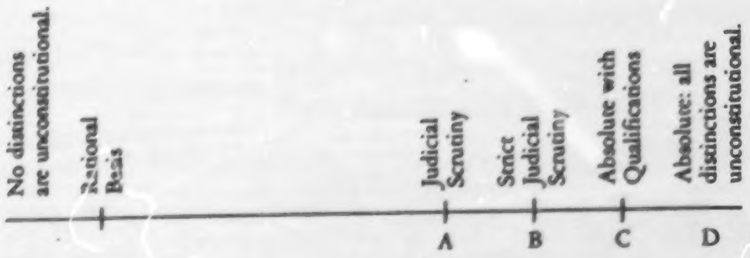
No distinctions are unconstitutional.
Rational Basis
Judicial Scrutiny
Strict Judicial Scrutiny
Absolute with Qualifications
Absolute: all distinctions are unconstitutional.
A
B
C
D

Diagram F

and coed dorms is exactly what they would like. For most people, however, these would be unwanted results and would therefore cause serious concern. For these people the starting point for determining whether the ERA is in our national interest is a frank recognition that no one knows what it will mean, and no one can know what it will mean until after it becomes part of the Constitution.

The only rational approach to the Equal Rights Amendment issue, therefore, is to recognize the risks that flow from the fact that the amendment might be interpreted in certain ways, and then to ask whether the benefits from the amendment outweigh those risks.

The risk side of the analysis has been the subject of preceding chapters: the different interpretations that might be placed on the amendment, and the comparative likelihood that one interpretation or another might be adopted.

The analysis turns now to the benefit side: how badly is the amendment needed and, to whatever extent the need exists, are there better ways to satisfy it?

The Lessons of History

The perspective of history offers a helpful starting point. In 1923, when the Equal Rights Amendment was first introduced, the Supreme Court of the United States had never even dealt with the argument that laws discriminating against women violate constitutional guarantees of equality. Highly offensive sex discriminatory practices had been consistently upheld.[1] Furthermore, women had enjoyed the most fundamental of all political rights—the right to vote—for only three years.

Three decades later, in the 1950s, a modified version of the ERA passed the Senate twice, but proponents characterized the modifications as an effective nullification.[2] As of that time, an equal protection argument had at least been presented to the U.S. Supreme Court in a sex discrimination case, but the Court easily rejected it and upheld the discrimination.[3]

Passage of the amendment by Congress in 1972 was preceded by almost two years of congressional consideration. Throughout most of those two years—more than a century after the general guarantee of "equal protection of the law" had been written into the Fourteenth Amendment—the equal protection clause had never been used to invalidate a sex discriminatory law. And most of the ERA proponents despaired of ever obtaining equality for women through the Fourteenth Amendment. Nevertheless, many of them conceded that, if the Supreme Court were to apply the Fourteenth Amendment's equal protection clause to women, the Equal Rights Amendment would be unnecessary.[4] Others disagreed.[5]

Reed v. Reed, the first Supreme Court case to hold a gender-based classification unconstitutional under the Fourteenth Amendment, was handed down in November 1971, after the House of Representatives had passed the Equal Rights Amendment but before Senate passage.[6] As is usually the case with developing constitutional doctrines, it was impossible to forecast in late 1971 how much protection *Reed v. Reed* would actually afford against sex discrimination. Specifically, the unanswered question was whether the rational basis standard would apply, so that invalidation of gender-based discriminations would be rare, or whether sex discrimination would be treated the same as racial discrimination, subject to strict judicial scrutiny.

Over the intervening decade since *Reed v. Reed,* the Supreme Court has developed a rather comprehensive body of case law dealing with sex discrimination. The standard is neither rational basis nor strict judicial scrutiny. It lies somewhere between the two. The result has been that the number of cases upheld and the number invalidated have been about equal. Whether the Supreme Court has gone too far, not far enough, or just about as far as it should is a matter for individual decision.[7]

But it is beyond dispute that the big leap has already been made. One of the proper roles for a constitutional amendment in achieving reform is to make large changes, to reach new ground previously unexplored. With respect to sex discrimination, a change of that magnitude was needed in 1971. It had been needed for decades and even centuries prior to 1971, but nothing had happened. Today, the situation is very different. There is no longer any question whether equality is constitutionally guaranteed to women. It is.

Some may argue that the principal reason for this change has been the pendency of the Equal Rights Amendment. That may or may not be true. In any event, it is largely irrelevant. Whatever the reason for our movement from nothing to judicial scrutiny along the sexual equality continuum, the fact is that we are there.

Massive Change or Flexibility?

Regardless of what the issues might have been in the 1920s when the amendment was first introduced, in the 1950s when it passed the Senate, or in the early 1970s when it was formally proposed by Congress, the central issues concerning the need for an Equal Rights Amendment in the 1980s are:

1. Whether the greater need is another radical, massive change in the constitutional rules dealing with distinctions between men and women, or
2. Whether the greater need is for flexibility in determining what kinds of distinctions between men and women are really in our national interest, and what kinds are not.

This correctly characterizes the issues today for this reason: the only room left for a change so great as to warrant a constitutional amendment is a change to an absolutist standard, qualified or otherwise. If the Equal Rights Amendment does nothing more than move us along the continuum from judicial scrutiny to strict judicial scrutiny, then the change is not worthy of a constitutional amendment. It is certainly not worth the risk of more radical change.

The real issue for each citizen, therefore, is whether he or she feels that all—or nearly all—governmental distinctions between men and women should be constitutionally eliminated. It is clear that some people would answer this question yes. But the great majority probably would answer it no. Almost none of those who testified at the congressional hearings, or those who drafted the reports recommending congressional passage, intended such an extreme result. They did not want to do away with virtually all governmental distinctions between men and women. They wanted a constitutional guarantee of equality for women. At the time there was none. Today there is.

For those Americans who share the view that we should leave some flexibility to make some governmental distinctions between men and women, another constitutional amendment is not the answer.

The second major purpose asserted by the proponents in urging congressional passage of the ERA was that such an amendment was needed as a symbol.[9] It is true that constitutional amendments can serve as symbols. The question is, a symbol of what? More specifically, how firmly should we freeze the capacity of our governmental structure to react? If we now have all or substantially all the answers concerning the distinctions that government should be able to make between men and women—particularly if we are convinced that there should be none or very few—then a constitutional amendment is an appropriate symbol.

For a constitutional amendment is the surest way to prevent government from drawing distinctions. If, on the other hand, we are still at the stage where we need to feel our way, committed to equality in the large matters like employment and promotion opportunity, educational opportunity, political activity, and e[illegible]y for equal work, but still uncertain about such things as the d[illegible]mbat, and promiscuity in state college dormitories, then a constitu[illegible]l amendment is the worst possible choice of a symbol.[9]

Experience Indicates the Need for Flexibility

Many people have the perception that, within the last few years, appointments to federal and state judgeships and to important executive positions in government have favored women. That is, if the appointee had not been a woman, someone else more qualified would have been appointed. Some believe that such preferences are not only fair and appropriate but necessary. They compensate for past discriminations against women and provide highly visible role models for future generations. Others take the view that whatever mistakes may have been made in the past, the burden of the corrective should not rest upon persons in today's society who have done no wrong.

The important issue is not whether the perception is correct, nor which side in the debate is right. The real issue is the debate itself. It should continue. In some instances treating women better than men with respect to government appointments is probably a good idea, and in other instances it is not. Moreover, whatever the balance of relevant considerations today, whether in general or in specific cases, the balance probably will be different a generation from now. Neither for this generation nor for those that will follow is it in our national interest to cut off debate on that issue by making unconstitutional government's power to prefer women.

Regardless of where we were ten years ago, or thirty years ago, or a hundred years ago, today we are at the fine-tuning stage. The need is for careful case-by-case examination of whether and to what extent men and women should be treated differently. A constitutional amendment, very simply, is not a fine-tuning instrument. It has more the qualities of a sledgehammer.

An incident that occurred during the period of my service in the United States Department of Justice illustrates the degrees of flexibility of different sources of law. A federal statute prohibiting sex discrimination by schools receiving federal financial assistance provides, among other things, that its provisions shall not be interpreted to prohibit father-son or mother-daughter activities as long as there is reasonably comparable opportunity for each.[10] In 1976 some administrators at the Department of Health, Education, and Welfare decided that a certain school district was not in compliance and determined to prevent further father-son banquets in that district until corrective steps were taken. The plan was never implemented—indeed, knowledge of its existence was limited—because some senior officials at the White House heard about it and brought it to an end with a telephone call.

The White House officials who reversed it considered the short-lived ban on father-son school banquets a silly decision. The reality is that in a government administered by human beings, we have to accept the fact that from time to time there will be silly decisions. The judiciary is also inhabited by human beings and they are not immune from the same kinds of mistakes that other human beings make. In the case of the father-son banquet decision, the mistake was easily correctible, requiring nothing more than a simple telephone call. If the same result had been unambiguously written into the statute, the corrective would have been more difficult, requiring congressional action. But by far the most inflexible source of law is a judicial decision interpreting a constitutional provision. Mistakes at that level can be corrected only by the death, retirement, or change of mind of Supreme Court justices, or by a constitutional amendment. The likelihood of any of these is extraordinarily rare. Over the history of our republic, literally thousands of constitutional amendments have been proposed. Excluding the Bill of Rights, whose adoption was part of the commitment for ratification of the Constitution,[11] only sixteen have been adopted.

Perhaps the best evidence that we are closer to the fine-tuning stage than to the major overhaul stage is provided by the 1980 experience with the draft. One of the few ERA results on which everyone agrees is that, if the amendment passes, women must be subject to the draft whenever men are. When the reinstitution of compulsory military service became an issue in 1980, the companion question was whether women should be subject to it. Most of the resistance was to drafting anyone, but a separate issue was equally identifiable and almost as strong: if there is a draft, should women be included? Leaders of several groups supporting the Equal Rights Amendment spoke in favor of equal treatment.[12] But our national legislators—who usually are a fair bellwether of national public opinion—separated the issues fairly early in the debate and determined that even if compulsory military service were to be reestablished, it would not apply to women.[13] Under the ERA Congress would not have had that choice.

Even as to one of the few ERA consequences on which everyone agrees, therefore, the 1980 draft experience shows that our nation is not at a point of consensus. We are not ready to harden the decision process into constitutional concrete. We need the leeway to make decisions on a case-by-case basis as particular issues—the draft among them—arise at different times and under different circumstances. Obviously this will not be done in a constitutional vacuum. Always in the background is the Fourteenth Amendment's guarantee that gender-based discrimination will be subject to judicial scrutiny.

Of course there are still examples of unfair sexual discrimination. Of course changes need to be made. But they should be made with a scalpel, not an axe. The tools for that kind of change are available. Indeed, changes by scalpel are already at work through the whole spectrum of law, including constitutional guarantees, statutes, administrative regulations, and ample authority to enact more statutes or administrative regulations as they are needed.

Adequate legislative authority exists without an additional constitutional amendment. Other things being equal—particularly if the subject matter does not require national uniformity—the best unit of government to enact laws is the smallest unit that has authority to do so. State and local governments have far-reaching powers, generally called police powers, to act in the interest of the general welfare of the people.[14] Accordingly they would have power to enact any conceivably necessary law. This is demonstrated by the liberalization that has occurred in state laws during the decade of the 1970s dealing with such subjects as family law (particularly the "tender years" doctrine and the circumstances under which a wife may establish a separate domicile), and the adoption of the equal management concept in community property states.[15]

In some instances, national uniformity might be preferred. While Congress's powers do not reach as many subjects as the states' police powers,[16] congressional enactments of Title VII of the Civil Rights Act and the Equal Pay Act[17] demonstrate that, under existing constitutional authorization, Congress too can be a significant force in making changes where changes are needed.

Shifts in Governmental Power

There is another cost of the Equal Rights Amendment. It is a cost that is necessarily involved in any constitutional amendment limiting what government can do, and particularly what state government can do. The cost involves shifts in governmental power. In the case of the Equal Rights Amendment, the shifts would occur along two planes.

By definition, a constitutional amendment which limits what government can do places its limitations on the legislature, within whose policymaking domain the power would otherwise fall. And since the interpretation of constitutional amendments is a judicial function, the decrease in legislative power is accompanied by an increase in judicial power. For example, if the Equal Rights Amendment were determined to prohibit separation of the sexes in college dormitories, the courts would make that determination by interpreting the amendment. The effect would be that the authority to decide this policy issue would shift from the legislature to the courts.

Most of the laws that would be held unconstitutional under the ERA are state laws. Accordingly, governmental power would shift not only from the legislature to the judiciary, but also from the smaller governmental unit (the state) to the larger (the federal government).[18]

Even in the absence of constitutional adjudication, there would probably be a legislative power shift from the states to the federal government, increasing the policymaking power of Congress and decreasing that of the state legislatures. It is a shift that would be accomplished as a result of Section 2 of the amendment. Before 1971 the proposed Equal Rights Amendment vested legislative enforcement authority jointly in Congress and the states. In 1971 state legislative enforcement authority was eliminated in favor of the present language of Section 2, which states: "Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

There is little doubt that Section 2 would shift legislative power from the states to the Congress. This would occur even if Section 2 were interpreted, as some of the proponents contend, not to have affirmatively constricted state powers in this area.[19] The constriction would necessarily result from expanded federal authority. The federal government, unlike the states, is a government of specific, enumerated powers, which means that anything the federal government does must be authorized by some constitutional provision. Within the sphere of its constitutionally authorized powers, however, the supremacy clause of the Constitution, contained in Article VI, provides that federal authority is supreme; that is, federal authority takes precedence where federal and state authority conflict. Accordingly, expanding the constitutional bases for congressional action in any area necessarily causes a corresponding reduction of the powers of state governments once Congress exercises its newly created constitutional power.[20]

In the case of some constitutional amendments, shifts of governmental power represent costs that are worth paying in order to secure the constitutional guarantee. And some people feel that governmental power shifts from the legislature to the judiciary,[21] or from state and local governments to the national government, are desirable. The only point is this: for those who believe that, other things being equal, it is better to vest governmental power in smaller units rather than larger, and in elected legislators who must periodically answer to the people than in nonelected judges, the shifts in governmental power that would accompany the Equal Rights Amendment represent another significant cost.

The Fourteenth Amendment Analogy

The potential dangers of the Equal Rights Amendment are posed by its breadth, its vagueness, and its uncertainty. No one knows how many specific prohibitions are included or are not included within its broad, unqualified declaration that there shall be no governmental distinctions on account of sex. But vagueness is also a characteristic of the Fourteenth Amendment, on whose existence a substantial part of the argument against the Equal Rights Amendment is based. Is it not unfair and inconsistent, therefore, to build an argument against the ERA on the combination of criticizing the vagueness of the proposed amendment while at the same time proclaiming the adequacy of the equal protection clause of the Fourteenth Amendment?

For anyone willing to learn the lessons of history, experience with the Fourteenth Amendment provides one of the most persuasive lessons why the Equal Rights Amendment should not be adopted. It is true that the Fourteenth Amendment, like the proposed Twenty-seventh, is vague. Look what the courts have done with that vagueness. At one period of our nation's history they used it to invalidate a broad spectrum of state laws regulating businesses,[22] including laws designed to protect the health of men and women in high health-risk employments. In more recent times the same amendment has been used, and is still being used, to prevent states from prohibiting or regulating abortions.[23] Many people thought that the Court's substantive due process nullification of governmental economic regulations was a good idea. Many people also agree with the Court's abortion decisions. The present point is not whether these decisions are good or bad. The point is that anyone who thinks that a constitutional amendment with the vagueness of the Fourteenth or the proposed Twenty-seventh is not an open invitation, and indeed directive, to perpetual judicial policymaking, is not aware of what the Supreme Court has been doing since about the 1890s.[24]

Does this mean that the Fourteenth Amendment should never have been adopted? Not at all. The Fourteenth Amendment brought about comprehensive changes that were needed. They were changes that only a constitutional amendment could achieve. Before the Fourteenth Amendment the guarantees of the Bill of Rights were not binding on the states. Aside from the guarantee of jury trial and the prohibition against ex post facto laws, state governments were not obligated to follow any standards of fairness in state criminal proceedings. Due process of law was binding on the federal government, but not the states. Most important for present purposes, there was no constitutional guarantee of equality anywhere in the Constitution.

The existence and history of the Fourteenth Amendment are relevant to the Equal Rights Amendment for three reasons. First, given the fact that the Constitution contained no guarantee of equality prior to the Fourteenth Amendment, the vagueness risk was worth taking. Now that there is a general guarantee of equality which extends to all groups, including women, the analysis is different. The vagueness risks are the same; the need is not. With the Fourteenth Amendment's guarantee of equality extending to all people, it is difficult to make a case for a separate guarantee of equality applicable to any group already covered by the equal protection clause. And if one particular group were to be singled out for such special treatment, it is hard to make the case that it should be a group that is not, in fact, a minority.

Second, the Fourteenth Amendment teaches that the risks of constitutional vagueness are never-ending. Vague amendments constitute a continuing, open-ended invitation to any new generation of federal judges to fill their ample vessels with new doctrine. The Fourteenth Amendment is particularly instructive in this regard. The first radical venture into judicial policymaking (when judges substituted their judgment for that of the legislature in government regulation of business) did not begin until almost thirty years after the amendment had become part of the Constitution.[25] It was a venture that lasted four decades and which, within its particular substantive sphere (economic regulation), today lies largely dormant.[26] Thirty years later the process started again, and it is continuing, this time affecting such substantive matters as contraceptives and abortions. The subject matter is different, but the process is not. Neither is the constitutional amendment under whose banner the process occurs.

The third lesson of the Fourteenth Amendment experience concerns the difficulty of undoing mistakes once they occur. During the economic-regulation round of the Supreme Court's fascination with substantive due process, the correction took forty years. For the abortion round, the correction has not yet occurred. Maybe it never will.[27]

In the case of the Fourteenth Amendment, the risks were worth running because the need for massive change was great. The changes were achieved, and the risks have proven to be real. But the risks entailed in the proposed Twenty-seventh Amendment are not worth running because the need for massive change is not great. Indeed, massive change is the biggest risk.

The Equal Rights Amendment

MYTHS AND REALITIES

by

ORRIN G. HATCH

5

The Constitutional Balance

The most compelling argument against the Equal Rights Amendment, in my own view, is that it will radically transform some of the most fundamental and enduring aspects of our Nation's constitutional structure. In pursuit of a legal equality between the sexes that has already been largely achieved under the present Constitution, the Equal Rights Amendment would effect major changes in the relationship between the institutions of government. It is this concern that motivates many of the most thoughtful opponents of the ERA, a concern that has generally been obscured amidst the far more glamorous and popular debates about abortion, women in the military, and unisex restrooms.

Legislative-Judicial Balance

As I observed earlier, either the ERA is clear on its face that there are no exceptions to the principle that men and women are always going to be treated in an identical manner, or else the exceptions are going to be established on an unpredictable and arbitrary case-by-case basis by Federal judges. Either understanding of the ERA creates difficulties.

If the ERA is construed to mean something other than its most obvious meaning—the absolutely identical legal treatment of the sexes—then it is unclear what the Amendment means at all. In short, there are no principles contained within the Amendment that provide any guidance about what exceptions are to be permitted, and under what circumstances. The result is that the ERA would substitute for the judgement of the fifty elected State legislatures the judgement of a handful of unelected Federal judges. As Professor Walter Berns of the American Enterprise Institute has observed,

> The ERA, if adopted, would be the only provision in the Constitution bestowing or protecting a right without identifying that right . . . What this implies is that it is not necessary to know what the language means because in due course the courts will tell us what it means . . . The Amendment should be labelled a judiciary act, inviting the courts to decide the particular issues that members of Congress would appear eager to avoid.[36]

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[36] Testimony on the Equal Rights Amendment Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, May 26, 1983. He further described this process as "treating the Constitution with contempt."

Issues of law that are now resolved through the democratic, legislative process would suddenly be "constitutionalized" into issues ultimately to be resolved only by the courts.

In the guise of interpreting the meaning of the Equal Rights Amendment, Federal judges would be virtually unrestricted in their ability to fashion innovative and creative new constitutional 'rights'. If the Amendment means something other than an absolute equality in legal treatment between the sexes, then it lacks any semblance of interpretative guidance for those who are primarily empowered to determine its "true" meaning. Given the checkered and confusing legislative history that has thus far been built up around the Amendment in Congress and the State legislatures, who is to contradict the Federal judge who rules unconstitutional virtually any Federal or State law that offends his own personal sensibilities? Where are the standards and the criteria for determining which interpretations of the ERA by Federal courts are right and which are wrong? There are no such standards and there are no such criteria. As Professor Freund notes in this regard,

> The issue is the integrity and responsibility of the lawmaking process itself.[37]

Thus, the ERA would worsen the increasingly prevalent situation under which the Federal courts have taken unto themselves (or been delegated) powers and authorities that have traditionally belonged to other more accountable branches and levels of government. The members of the Federal judiciary—who serve lifetime appointments and who tend almost uniformly to be upper middle class attorneys—have become responsible for policy-making decisions in a growing number of areas that were formerly reserved for the more representative bodies of government. As one commentary has observed,

> It is an open secret that most major social reforms of the last generation have been accomplished by the judiciary. In what amounts to a cloverleaf of Damascus Roads, the Supreme Court has declared unconstitutional such previously accepted practices as capital punishment and school prayer and has unilaterally effected one-man, one-vote state legislative apportionment, affirmative action, abortion on demand, and the abolition of residency laws for welfare eligibility.[38]

It has been the Federal judiciary that has made many of the most important public policy decisions of the past two decades, not the Congress and not the State legislatures.

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[37] Freund, The Equal Rights Amendment is Not the Way, 6 Harv. Civil Rights-Civil Liberties L. Rev. 234, 242 (1971).

[38] Brimelow and Markman, Supreme Irony, *Harper's*, October 1981, 16. See Ginsburg, Sex Equality and the Constitution, 52 Tulane L. Rev. 451, 474 (1978) ("ERA at a minimum should relieve the Supreme Court's anxiety expressed by Justice Powell in his *Frontiero* opinion, namely the hesitation to shape new constitutional doctrine without a firm root for that doctrine in the Nation's fundamental instrument of government."); Ginsburg, Let's Have the ERA As A Signal, 63 ABA J. 70 (1977) (ERA as a signal to Supreme Court to "articulate general principles" and develop a "coherent opinion pattern".)

Most of these judicially-made laws and policies have been created, not as a result of the clear language of the Constitution or through an understanding of the intent of its drafters, but through the "interpretation" of provisions of the Constitution that suffer from some of the same problems of vagueness as the Equal Rights Amendment. It is unclear to me why anyone who is committed to the principle of self-rule and popular government would wish to further accelerate this process. Why would they wish to entrust greater decision-making authority in unelected and unaccountable judges and reduced authority in elected and accountable legislators? This would be an almost certain result of passage of the Equal Rights Amendment.

Federal-State Balance

While the Equal Rights Amendment will almost certainly have a significant impact upon the "separation of powers" between the judicial and legislative branches of government, equally disturbing is its likely impact upon the constitutional "division of powers" between the States and the Federal government. U.S. Solicitor General Rex Lee has stated, for example, that if the ERA is ratified,

> there is little doubt that [it] would shift legislative power from the States to the Congress.[39]

What Dean Lee alludes to is that the ERA will result not only in sharply enhanced authority for the Federal courts, but will lead to greater legislative powers as well in the U.S. Congress at the expense of those currently possessed by the State legislatures.

The key to understanding the full scope of Federal authority contained in the ERA is an understanding of its much-overlooked section 2. This section reads,

> The Congress shall have the power to enforce by appropriate legislation the provisions of this Article.

This provision is nearly identical to so-called "enforcement" or "enabling" clauses in other amendments to the Constitution, including the Thirteenth Amendment (slavery), the Fourteenth Amendment ("due process" and "equal protection"), and Fifteenth Amendment (voting rights).

What the "enforcement" clause of the ERA does is to accord Congress legislative authority over the entire range of issues within the scope of the Amendment. As described by one of the architects of the ERA, Congresswoman Martha Griffiths, "the intent of section 2, is to make State laws 'uniform'."[40]

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[39] Lee, A Lawyer Looks at the Equal Rights Amendment (Brigham Young University Press, 1980) at 88.

[40] Testimony before the Missouri House of Representatives on the Equal Rights Amendment, January 28, 1975. It is interesting to note that, until 1970, the enforcement clause of section 2 read differently. Prior to that time, enforcement authority was not concentrated solely within Congress, but accorded to both Congress and the States "within their respective jurisdictions." See Senate Hearings at 208.

Under section 2, Congress could enact national legislation in countless areas in which it currently lacks authority and override the considered decisions of all fifty State legislatures. Professor Phillip Kurland has testified that,

> An Equal Rights Amendment would be more important for its enabling clause than for its direct substantive effect.[41]

Under the ERA, for example, the Congress could venture into such new areas as setting alimony policies for the States, rewriting State laws on rape and prostitution, establishing new policies on casualty and life insurance, imposing new labor laws on the States, and so forth. In each of these areas, traditionally the prerogative of the States, Congress would be empowered by the ERA to set forth uniform, Federal standards in the name of "enforcing" the Equal Rights Amendment. In each of these areas, the values of State and local diversity, and

Katzenbach v. Morgan

In order to fully understand the significance of the "enforcement" clause in the ERA (section 2), it is necessary to understand the Supreme Court case of *Katzenbach u Morgan*[1] in which the Court interpreted the extent of Federal authority under an identical provision of the Fourteenth Amendment.

In *Katzenbach*, the Court made clear that this provision does not merely give Congress the authority to *enforce* those rights which are already understood to exist in the basic provisions of the Fourteenth Amendment, but gives the authority to *define* those rights as well. In light of the vagueness of the Fourteenth Amendment, this gives Congress the expansive authority to define "due process" or "equal protection" and obligate the States to abide by these definitions.

The same would be true about the "enforcement" clause of the ERA. Congress would not be limited to "enforcing" rights against the States that had already been established by the courts, but would be able to define, *in the first place*, such rights and require State laws to be consistent. Congress could effectively nullify provisions of the Constitution which confer primary power upon the States.

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[1] 384 U.S. 641 (1966). See also Burt, Miranda and Title II: A Morganatic Marriage, 1969 Sup. Ct. Review 81,133; Browne, Congressional Enforcement Power Under the Fourteenth Amendment, 55 Denver L. Rev. 417 (1978).

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[41] House Hearings at 584.

the benefits of State and local legal experimentation, would be replaced by a single Federal law imposed upon the fifty States.

One ERA proponent, Anita Miller, the former Chairwoman of the California Commission on the Status of Women, was not far from the mark in describing the ERA as,

> the single most significant event of this century . . . It will bring about a dimension of change greater than ever before.[42]

At least in the area of constitutional structure, this may well be true. Perhaps as much as any other constitutional amendment in history, the ERA has the potential to centralize and concentrate governmental authority in the Federal government and to reduce the States to little more than an administrative arm of the legislators and bureaucrats in Washington.

Former United States Senator Sam Ervin has said in this regard,

> Section 2 of the ERA . . . will come near to abolishing the States of the Union as viable governmental bodies. . . . it will virtually reduce the States of this Union to meaningless zeros on the Nation's map by transferring virtually all of the legislative power of government from the States to Congress.[43]

As a result then of section 2, both Congress and the Federal Courts would be authorized to use the vague provisions of the ERA as a mandate for the establishment of new rights that would affect virtually every area of State law. Thus, the most certain impact of the ERA, regardless of who takes the primary role in this process of "interpretation", is that government responsibilities will be taken from the States and shifted in the direction of Washington. Whether these responsibilities are vested in the Congress or in the Federal courts, it is certain that they will be vested in institutions of government that are further removed from the individual citizen and less likely to be directly accountable to his or her desires.[44]

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[42] *The Los Angeles Times*, March 1, 1974 at 1.

[43] Testimony of Senator Ervin on the Equal Rights Amendment before the North Carolina General Assembly, March 1, 1977; see also Pitschke, The Case Against the Proposed Twenty-Seventh Amendment, Congressional Record, August 14, 1978, E4552; Strong, Contribution of the ERA to Constitutional Exegesis, 14 Ga. L.Rev. 389, 418–34 (1980).

[44] See Minority Views of U.S. Rep. Edward Hutchinson, House Report at 14 ("will transfer the power to determine public policy . . . out of the legislative branch of government, the branch most directly responsive to the public will, and place it in the judiciary, the branch least responsive. . .").

ERA: The Constitutional Impact

State Legislatures → **Federal Courts**
Congress → **Federal Courts**

Authority will be shifted from State and national legislatures as the ERA "constitutionalizes" areas of law that were formerly within the scope of legislative judgement. Matters that were formerly those of legislative discretion will now be those of judicial "interpretation". The vagueness of the ERA will accord Federal courts great discretion to set policy in the guise of "interpretation" of the Amendment

State Legislatures → **Congress**

Authority will be shifted from the State legislatures to the Federal legislature (Congress) because of section 2 of the ERA which gives Congress full authority to enforce (and define) its provisions and set national standards in numerous areas in which it currently lacks legislative authority.

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SEX DISCRIMINATION AND THE UNITED STATES SUPREME COURT: DEVELOPMENTS IN THE LAW

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CONCLUSION

During the thirteen year period between 1971 and the present, progress has been made toward achieving clarity and consistency in the area of sex discrimination law. Under the equal protection clause, the Court has done much to eliminate the division that pervaded the Court before Craig v. Boren, between those who who thought sex was a suspect class, similar to race, and those who believed it should be accorded a lesser standard of review. Thus, Craig was a landmark decision for the Court in the area of equal protection and gender discrimination as it clarified the Court's position that sex classifications would be subject to an intermediate level of scrutiny. However, it is arguable that some uncertainty may still exist on the Court, as Justice O' Connor suggested in Hogan six years after the Craig decision, that the Court may yet declare sex a suspect classification. At this writing, there has been no indication that the Court will do so, thus leaving the intermediate standard of Craig intact.

After Craig, the Court in subsequent decisions attempted to clarify the analysis necessary under the intermediate substantial relationship test. Early cases involving gender discrimination and the Social Security Act are relevant to the two concepts of upholding ameliorative legislation, and rejecting legislation based on outmoded stereotypes. Webster and Goldfarb, two Social Security decisions, are significant because of the way the Court viewed the disparate treatment in each case. In Webster, the Court held that where there is disparate treatment of the sexes as a result of legislation directly addressing discrimination (which also serves to remedy it) such a provision is constitutional at least as an interim measure. In Goldfarb, because the disparate treatment of the sexes was regarded by the Court to be the by-product of traditional stereotypes and was not specifically aimed at redressing past injustices, the Court regarded such unequal treatment based on sex to be unconstitutional. After Webster and Goldfarb, it was clear that the Court was reluctant to uphold any gender classification unless its purpose was ameliorative.

Orr v. Orr reinforced the Court's position stated in Webster. The holding in Orr prohibited discrimination based on traditional stereotypes in the context of alimony obligations upon divorce. Because the Court in Orr would not allow alimony obligations to be imposed on husbands and not wives, it demonstrated that the intermediate standard of review was the same regardless of whether women or men were disadvantaged by the classification. Also in the family law context, the Court decided Caban and Parham. The Court held in both of these cases that men and women were not similarly situated because of the differing nature of their parental role. Parham and Caban reinforced an essential element of the substantial relationship test that men and women must be similarly situated in order for the classification to be challenged.

The Court also settled another aspect of gender discrimination law during 1979. In Feeney, it refused to strike down a facially neutral law which had a discriminatory effect on women because discriminatory motive or intent was not shown. The Court held that discriminatory motive or intent must be shown in sex discrimination cases as it is in other areas under the equal protection clause in order to establish a prima facie case.

Up until 1980, the Court had at times implied that benign classifications (i.e. classifications benefiting women) would be subject to lesser scrutiny than other classifications. However in Wengler the Court took a firm position that the substantial relationship test should be used in all gender discrimination cases without regard to whom the classification benefits. Thus, after Wengler the Court had reached a certain level of stability in the gender discrimination area under the equal protection clause.

The decisions during the next term seemed to retreat from the firm position taken in Wengler. The Court used language during the 1980 Term that did not have the strength and force of that used in the Wengler case. In Michael M. and Rostker, it ruled that the males and females involved were not similarly situated, thus the classifications were validated.

The Court in 1982 decided Hogan, the last gender discrimination decision based on equal protection grounds at this writing. In Hogan, the Court was concerned with the use of a benign or remedial purpose as a pretext, while actually reinforcing traditional stereotypes. In an attempt to remedy this problem, the Court held that a remedial purpose is only valid if the gender benefited by this action was actually disadvantaged by the classification in the past. Hogan illustrates the Court's constant awareness of the different ways in which traditional stereotypes were still perpetuated.

The gender discrimination cases decided under Title VII of the Civil Rights Act of 1964 underwent a different analysis from that used under the equal protection clause. The Court in Griggs decided for the first time that adverse impact was enough to make out a *prima facie* case under Title VII. In Dothard, it indicated that the ruling in Griggs pertained to gender as well as race.

Significant decisions under Title VII have been rendered with respect to equal pay, pensions and pregnancy. In the equal pay area Gunther made it clear that valid claims of sex-based wage discrimination could be made despite the fact that males and females involved had different jobs if there was evidence of intentional discrimination. However, it remains an open question whether a cause of action could be stated when one sex's lower wages were not attributable to intentional discrimination.

In the contexts of pension and insurance, the Court examined a situation in which women had to contribute more than similarly situated males to obtain the same benefits upon retirement (Manhart) and another situation in which women received smaller annuity payments than men in a deferred compensation plan. (Norris). The Manhart decision established that mandatory unequal pension contributions by employees to an employer sponsored or administered retirement program, violated Title VII. In Norris, the Court held that employers be required to treat employees as individuals, specifically rejecting the generalizations based on group experiences. Moreover, employers could not escape liability for the discrimination on the theory that the insurance companies were the actual users of the sex-based tables. The Court also found it irrelevant whether a plan was voluntary or mandatory. The thrust of Norris and Manhart was that employers must consider employees on an individual basis and therefore were not permitted to use sex-based actuarial tables in the pension or insurance contexts.

In the pregnancy area there has been one Supreme Court decision since the adoption of the Pregnancy Discrimination Act of 1978. This case, Newport News Shipbuilding, is significant because of its interpretation that the Pregnancy Discrimination Act applies to the dependents of both male and female employees who are discriminated against.

The Court in interpreting Title IX of the Education Amendments of 1972 has clarified many issues associated with this avenue for gender discrimination litigation. After Cannon, there was no question that a private right of action could be implied under Title IX, and North Haven Board of Education removed any doubt that Title IX covered employees as well as students of a school.

The most significant case in the Title IX area recently was Grove City. The Court in Grove City applied a very narrow reading of Title IX's enforcement mechanism. The Court specifically held that the termination of federal money as a means of enforcing Title IX reached only the specific program or activity receiving the federal funds and not the entire institution. The impact of this decision is unclear but could possibly result in Congress taking legislative action to amend Title IX to clarify this statute's coverage and enforcement provisions.

The most recent cases decided by the Supreme Court, Shell and Heckler, are significant because of their holdings with regard to the procedural aspects of bringing a Title VII gender discrimination suit. These two cases illustrate the Court's intention to keep access to the Court clear from procedural barriers placed in the way of worthwhile claims in the sex discrimination context.

In summary, over the last thirteen years the Supreme Court has made significant progress in the area of gender discrimination. The Court will also be hearing and deciding more cases in the future. At the date of this writing, the Court has already agreed to hear a Title VII case during its upcoming 1984 Term, the Bessemer City case. While the Court has resolved numerous questions concerning gender-based discrimination law in the past, there are still problems awaiting future consideration, e.g. whether the Court's interpretation of "comparable worth" presents a cognizable cause of action under Title VII absent proof of intent to discriminate. The consideration of this and other issues in the future will add to the body of law that has been developing with respect to sex-based discrimination.

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Washington, D.C. 20540

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TO :

FROM : American Law Division

SUBJECT : Supreme Court Decisions Applying Equal Protection Clause to Sex Classifications

The 14th Amendment provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." While the Fifth Amendment, which binds the Federal Government, contains no express equal protection clause, the Supreme Court has held that its proscription against denying any person "life, liberty or property, without due process of law" incorporates an equal protection principle that, in most cases, requires the National Government to observe the same strictures on classification and discrimination that the States must follow. E.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n. 2 (1975); Buckley v. Valeo, 424 U.S. 1, 93 (1976).

"The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." Justice Frankfurter once wrote. "They do not relate to abstract units, A,B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas, 310 U.S. 141, 147 (1940). The mere fact of classification will not void legislation, then, because in the exercise of its powers a legislature has considerable discretion in recognizing the differences between and among persons and situations. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." Barbier v. Connolly, 113 U.S. 27, 32 (1885). Or, more succinctly, "statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution." *Ferguson* v. *Skrupa*, 372 U.S. 726, 732 (1963).

Recognition of the fact that equal protection does not deny the right of classification, however, leads to the more difficult question of how it is that a court may determine whether a classification is proper or improper, whether, to state it in traditional terms, a classification constitutes invidious discrimination. Key to this determination is the usual presumption of constitutionality which a court accords to legislative and administrative action, especially the deference a court owes to the legislative branch. The Supreme Court early adopted the "rational basis" test, under which so long as a classification has any reasonable basis whatever, as long as it is not wholly arbitrary, the Court will find no violation of equal protection. There are actually two different formulations of the rational basis test, one deriving from *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), which is so extremely deferential that hardly anything would fail to survive a challenge, and the other from *Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920), which, though deferential, retains to the courts some degree of scrutiny over the classification. Over the years, one or the other test has been utilized by the Court, and the present Court [illegible] closely and inconclusively divided with respect to which to apply. Compare *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166 (1980), with *Schweiker* v. *Wilson*, 450 U.S. 221 (1981); and see *City of Mesquite* v. *Aladdin's Castle*, 455 U.S. 283, 294 (1982), and *id.*, 296-297 (Justice White), 301-302 (Justice Powell).

In any event, the test is generally stated to the effect that as long as a classification is rationally related to some legitimate or permissible governmental interest, then the classification will survive equal protection attack. Using this test, the Court had sustained classification which had an adverse impact upon women. E.g., *Goesaert* v. *Cleary*, 335 U.S. 464 (1948)(bar on women as bartenders, except for the wives or daughters of male owners); *Hoyt* v. *Florida*, 368 U.S. 57 (1961)(law required jury service of men but gave women option to serve or not). When in *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court for the first time held invalid a sex classification it purported to rely on the rational basis test, but many saw in the opinion something a little less deferential.

Although it was long in stating the test explicitly, the Court has developed a strict standard of review when racial classifications are in issue. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). Thus, when government classifies on the basis of a "suspect" standard (or when it classifies with regard to a "fundamental" interest), it must justify those classifications by showing a compelling interest necessitating the action and that the distinctions are necessary to further the purpose sought to be furthered. See San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Even when a racial classification is used, however, there may be the requisite showing to sustain it. Lee v. Washington, 390 U.S. 333 (1968)(preservation of discipline and order in a jail might justify racial segregation if shown to be necessary).

In recent years, the Supreme Court has adopted an "intermediate" standard for certain classifications, one less deferential than the rational basis test and one less strict (and one less fatal) than the "suspect class-fundamental interest" test. Actually, there may be a range of intermediate tests, judging from the opinions dealing with classifications on the basis of sex, alienage, and illegitimacy. Thus, sex classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976); Mississippi University for Women v. Hogan, 102 S. Ct. 3331, 3337 (1982). Four Justices, in Frontiero v. Richardson, 411 U.S. 677 (1973), were prepared to hold sex a suspect classification; three Justices declined on the basis that such a holding was premature as long as the Equal Rights Amendment was pending and in any event they thought the classification at issue failed the rational basis test. An eighth Justice voted to strike down the classification without explicitly stating a test and the ninth Justice dissented. In her opinion for the Court in Mississippi University for Women v. Hogan, supra, 3336, n. 9, Justice O' Connor appeared to leave open the possibility that sex may yet be declared a suspect classification.

The intermediate standard is applicable and is the same whether women or men are disadvantaged by the classification. Orr v. Orr, 440 U.S. 268, 279 (1979); Mississippi University for Women v. Hogan, supra, 3336, although Justice Rehnquist and Chief Justice Burger have argued that when males are disadvantaged only the rational basis test is appropriate. Craig v. Boren, supra, 218-221; Califano v. Goldfarb, 430 U.S. 199, 224 (1977). However, the standard used to evaluate ostensibly "benign" classifications, that is, classifications expressly sex-based designed to compensate women for past discrimination, is in flux. At first, the rational basis test was applied to sustain such enactments, despite the improbable character of the compensatory rationales advanced by the government. Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975). Later cases have applied the intermediate test, finding that if in fact a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women", it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective. Califano v. Webster, 430 U.S. 313, 316-318, 320 (1977). See Orr v. Orr, supra, 280-282; Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150-152 (1980); Mississippi University for Women v. Hogan, supra, 3338-3340.

We below list in summary fashion the cases in which sex classifications have been challenged under the equal protection clause since Reed v. Reed, supra, was decided in 1971.

(A) Cases in Which Challenge Was Successful

(1) Reed v. Reed, 404 U.S. 71 (1971). State probate law which gave males preference over females when both were equally entitled and qualified to administer an estate is invalid.

(2) Frontiero v. Richardson, 411 U.S. 677 (1973). Military allowance plan under which a serviceman could claim his spouse as a dependent while a servicewoman's spouse was not considered a dependent unless he was shown in fact to be dependent upon her for more than one-half of his support is invalid.

(3) Taylor v. Louisiana, 419 U.S. 522 (1975). Provisions qualifying males for jury service but qualifying women only if they had previously filed a written declaration of desire to serve are invalid. (Decided under Sixth Amendment but using equal protection analysis).

(4) Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Social Security provision that grants survivors' benefits based on earnings of deceased husband and father to his widow and to couple's children in her care but that grants benefits based on earnings of covered deceased wife and mother only to minor children and not to widower is invalid.

(5) Stanton v. Stanton, 421 U.S. 7 (1975). Age of majority statute applied in context of child support requirements obligating parental support of son to age 21 but daughter only to age 18 is invalid.

(6) Craig v. Boren, 429 U.S. 190 (1976). Statutory prohibition of sale of 3.2% beer to males under 21 and to females under 18 is invalid.

(7) Califano v. Goldfarb, 430 U.S. 199 (1977). Social Security provision awarding survivors' benefits based on earnings of deceased wife to widower only if he was receiving at least half of his support from her at the time of death, whereas widow receives benefits regardless of dependency, in invalid.

(8) Califano v. Silbowitz, 430 U.S. 924 (1977); Califano v. Jablon, 430 U.S. 924 (1977). On authority of Goldfarb, Court summarily held invalid identical husbands' insurance benefit provisions in Social Security Act also premised on one-half support requirements.

(9) Railroad Retirement Board v. Kalina, 431 U.S. 909 (1977). On authority of Goldfarb, Court summarily held invalid an identical provision of the Railroad Retirement Act.

(10) Duren v. Missouri, 439 U.S. 357 (1979). Provision excusing from jury service any women requesting exemption is invalid. (Decided under Sixth Amendment but using equal protection analysis).

(11) Orr v. Orr, 440 U.S. 268 (1979). Statute imposing alimony obligation on husbands but not wives is invalid.

(12) Caban v. Mohammed, 441 U.S. 380 (1979). Law permitting an unwed mother but not an unwed father to block the adoption of their child by withholding consent is invalid.

(13) Califano v. Westcott, 443 U.S. 76 (1979). Social Security provision extending benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but not giving benefits when the mother becomes unemployed is invalid.

(14) Wengler v. Druggists' Mutual Ins. Co., 446 U.S. 142 (1980). State workers' compensation law denying a widower benefits on his wife's work-related death unless he is mentally or physically incapacitated or proves dependence on her earnings but granting a widow death benefits regardless of her dependency is invalid.

(15) Kirchberg v. Feenstra, 450 U.S. 455 (1981). State law giving husband unilateral right to dispose of jointly owned community property without spouse's consent is invalid.

(16) Mississippi University for Women v. Hogan, 102 S. Ct. 3331 (1982). Policy of University to limit admission to its nursing school to women, although two other nursing schools in State admitted men, is invalid.

(B) Cases in Which Disparate Treatment Was Sustained as Compensatory

(1) Kahn v. Shevin, 416 U.S. 351 (1974). State property tax exemption allowing widows but not widowers a $500 exemption corrects for economic and employment disabilities of women.

(2) Schlesinger v. Ballard, 419 U.S. 498 (1975). Navy policy of discharging male officers who twice fail of promotion whereas women were afforded a fixed and longer period before discharge for want of promotion corrected for fewer promotional opportunities for women.

(3) Califano v. Webster, 430 U.S. 313 (1977). Social Security provision consciously and expressly designed to compensate women for employment discrimination by giving them a more favorable time period than men had to compute the average monthly wage on which old-age insurance was based was valid.

(C) Cases in Which Sex Classifications Were Sustained

(1) Vorchheimer v. School Dist. of Philadelphia, 430 U.S. 703 (1977). Being equally divided, Justice Rehnquist not participating, the Court affirmed a lower court decision sustaining the maintenance of two single-sex high schools of equal educational offerings.

(2) Fiallo v. Bell, 430 U.S 787 (1977). Because of Congress' plenary powers over admission of aliens, an immigration preference granted to mothers but not to fathers is valid.

(3) Parham v. Hughes, 441 U.S. 347 (1979). Permitting mother of an illegitimate child to sue for wrongful death of child but permitting father to sue only if he has legitimated the child and the mother is dead or cannot be accounted for is valid because the important governmental interest in avoiding difficulties in proving paternity was advanced by the distinction. (Omitted here are a series of cases, some sustaining, some voiding statutes, which made distinctions between fathers and mothers of illegitimate children when the disadvantage burdens the child rather than the father or mother. E.g., Trimble v. Gordon, 430 U.S. 762 (1977); Lalli v. Lalli, 439 U.S. 259 (1978)).

(4) Michael M. v. Superior Court, 450 U.S. 464 (1981). Statutory rape statute applicable only to males is not sex discriminatory, since in this respect males and females are not similarly situated. Because only women can become pregnant, they are visited with a deterrence men are not subject to, so that men must be deterred by a law applicable only to them.

(5) Rostker v. Goldberg, 453 U.S. 57 (1981). Requiring only men to register for draft is valid. Again sexes are not similarly situated, since military policy of using only men in combat was not challenged and purpose of draft and registration was to raise force of men for combat, and limiting registration to men served that policy.

Finally, it should be noted that the intent requirement of equal protection litigation is applicable in sex classification cases. That is, a law which is neutral on its face and which serves ends within the power of government to pursue is not invalid simply because it may affect a greater proportion of one sex than of the other. Discriminatory purpose, motive, or intent must be shown. It must be shown that the decisionmaker selected or reaffirmed a particular course of action, at least in part because of, not merely in spite of, its adverse effects upon an identifiable group. Thus, a veterans' preference law which benefited largely but not exclusively men and which had a severe impact mostly but not exclusively upon women was held not invalid under the equal protection clause. *Massachusetts Personnel Admr.* v. *Feeney*, 442 U.S. 256 (1979).

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V. MISCELLANEOUS ISSUES

THE IMPACT OF THE EQUAL RIGHTS AMENDMENT

The SPEAKER pro tempore (Mr. HAYES). Under a previous order of the House, the gentleman from Wisconsin (Mr. SENSENBRENNER) is recognized for 60 minutes.

Mr. SENSENBRENNER. Mr. Speaker, during the past 2 months, each Tuesday, I have reserved time for a special order which focused on the impact that House Joint Resolution 1, the proposed equal rights amendment, will have on our laws and society. This special order examines the economic effects of the ERA. The economic effects of this proposed constitutional amendment range far and wide. Not only would it alter our social security system, insurance rate, and pension plans, but it has the potential of radically affecting the market place.

First, let us look at how ERA would affect our economy. In other words, how will it affect the supply and demand principle that governs our marketplace? A major issue for ERA proponents is that of the wage-gap between men and women. They argue a woman earns 63 cents for every dollar paid to a man. A major thrust in the passage of the ERA is to correct this so-called inequity. I say so-called inequity because evidence shows that while there is no question that sex discrimination has long been a serious problem and inhibits women from realizing their full potential, there are numerous other variables which need to be factored into explaining the disparity in pay betwen men and women. Judith Finn, an economist from Oak Ridge, Tenn., in her testimony before the Committee on Labor and Human Resources of the other body, stated that, "the earnings gap is due to the fact that women do not do the same work as men, and the get different pay for different work."

Understanding this wage gap requires explanation of reasons why women, on the average, hold lower-paying jobs than men. In the past, women, especially working mothers, have been entering into the job market preferring traditional jobs such as nursing, teaching, bookkeeping, and so forth. Jobs which they can leave and come back to, but which are also low paying. However, in the past decade, huge numbers have been moving into such jobs as real estate agents, insurance adjusters, production line assemblers, inspectors, or school bus drivers—the so-called nontraditional jobs. And they are making the same entry-level rates for these jobs as entry-level men. The result: While women over 35 are still earning 59 cents for every dollar earned by men, in the 25-34 age group, that figure has jumped to 72 cents, and in the 20-24 age group, to 87 cents. As more and more women who entered the job market in the last decade start moving up to take advantage of higher paying jobs, the ratio of women's wages to men's should be set for a sustained rise.

June O'Neill, of the Urban Institute, in the February 7, 1984, Wall Street Journal, was quoted as saying sexism has little to do with the earnings gap. She explained, it has more to do with the way women choose to participate in the economy; many work part time, while others leave the job market for a few years to raise children. Ms. O'Neill figures that women, on the average, work only 50 to 60 percent of their available years once they leave school; men, on the whole, work all of these years. The average woman has less experience (and fewer skills) and therefore is less valuable to an employer. This is slowly changing as more women chose full-time careers as well as choosing higher paying professions. For example, in 1970, women only earned 8 percent of U.S. medical degrees. By 1980, they had earned 23 percent. Nearly one-third of all law school graduates are now women. This is a dramatic increase from 5 percent in 1970. In 1980, 10 percent of engineering graduates were women, up from 1 percent in 1970. In time, this higher education will help narrow the pay gap.

Group differense in occupational success is a stubborn fact of American life, especially for the occupational status of women. The questions of why there exists sex segregation and why men are more often promoted over women was the subject of a study done by Hoffman Research Associates. Mr. Carl Hoffman, of the Hoffman Research Associates, gave testimony during the ERA hearings before the House Subcommittee on Civil and Constitutional Rights. Their study entitled, "Sex Discrimination? the XYZ Affair" which was published in the Journal, the Public Interest, showed a number of things, one of the most interesting dealt with promotions of workers. Their study was done on a Fortune 500 company charged with sex discrimination by several of its female clerks. The charge of discrimination stated that men were more often promoted over women from entry-level positions, even though there were a greater percentage of women hired for these entry-level jobs. The results of the study showed that women got promoted in almost the same proportion as they expressed interest in promotion; however, because they exhibit less interest in promotion and engaged in less promotion seeking activities, they wer promoted less often.

Another cause for the earnings gap was explained by Cotton Lindsay Mather, a professor of economics at Emory University. She asserts that women tend to take the primary role in managing homes, thus they tend to seek out jobs which allow flexible hours in order to be close to home. Also, because women tend to follow their husbands through career changes and job transfers, they seek easily transferrable jobs. The end effect is that women crowd into certain jobs, such as nursing and secretarial jobs and in turn drive down the value of those jobs. In essence, it is not discrimination, but a simple function of the supply and demand of the marketplace.

Finally, let us look at the situation of single women in our work force. If the wage gap really is caused by sex discrimination, then those making this charge have to explain why studies have found that single woman earn almost the same wages as single men. The reason is mainly because they have similar employment characteristics: The single women is less likely than a married woman to leave the labor force for household reasons, such as raising children or because her husband has changed jobs. So skill and experience become the dominant factors in wage-setting. Neither single women nor single men, on the other hand, are likely to work as hard as married men, who often have the added responsibility of supporting dependents.

In an examination of the wages of married and unmarried females, for instance, Hoover Institution economist Thomas Sowell, notes in his article entitled, "Affirmative Action Reconsidered" published in the 1976 winter editon of the Public Interest that unmarried men and women receive about the same in wages for the same job and the same credentials. Married men tend to do better, he says, because they are motivated to provide financial assistance for their spouses, who is turn do somewhat worse in the market because of other duties. Sowell notes that, "Such a situation may not be just—but it does not result, however, from employer discrimination." The examples I have given illustrate more than satisfactorily that other factors, besides sex discrimination, cause the current wage gap.

The question remains, do we artificially raise the wages of women, laying aside our knowledge of the marketplace and other factors involved in women's occupational choice? For a moment, let us say we did. What would be the effect on our economy? In a September 11, 1978, Fortune magazine article entitled, "The EEOC's Bold Foray into Job Evaluation" it was noted that if the aggregate pay of the country's 27.3 million fulltime working women was raised high enough so that women's pay would be equal to men's, it would add $150 billion to the civilian payrolls. I asked the Congressional Research Service of the Library of Congress to use this figure and factor in inflation to see what it would cost in the future. In 1982, the cost would have risen to $334 billion.

While the ERA only affects governmental employment policies, it would give impetus and possibly another avenue for the filing of lawsuits for sex-based wage discrimination based on the alleged principal of "comparable worth." The concept of equal pay for equal work has been replaced recently by the concept of "equal pay for comparable worth." This doctrine refers to the situation where two groups are performing work that is different, but is in some way of comparable worth to the employer. The doctrine is based on the presumption that this worth can be measured by a job evaluation scheme and this job evaluation will not be biased in itself. Discrimination exists under this doctrine when workers of one sex, for example, are receiving less wages for their work than fellow employees who are performing different jobs, but which arguably have the same value to the employer.

The concept of comparable worth is part of the larger issue of pay equity. In 1963, Congress enacted the Equal Pay Act which prohibits sex discrimination in wages with respect to work that requires equal skill, effort, and responsibility, being performed under similar working conditions.

Then, in 1964, Congress passed title VII of the Civil Rights Act which prohibits discrimination in employment and applies sex and other factors such as race, religion, and national origin. Title VII was amended in 1972, and now pertains to Federal, State, and local employers, as well as those in the private sector. Unlike the Equal Pay Act, title VII prohibits sex discrimination in hiring practices and fringe benefits as well as wages. Title VII is thus broader than the Equal Pay Act.

Proponents of comparable worth assert that jobs primarily held by women are undercompensated relative to those jobs characterized by similar skills and responsibility which are primarily held by men. This similarity is supposedly determined by a point system in a nonbiased job evaluation scheme. They further assert that this underevaluation of women constitutes overt sex discrimination. Here again, the real differences causing the wage gap, which I have previously enumerated, have been overlooked, and once again, a comparison of apples to oranges is being made.

The comparable worth doctrine was brought to the forefront in two court decisions. In January 1981, the Supreme Court held in the *County of Washington, Oregon v. Gunther*, 452 U.S. 161 (1981), that title VII of the 1964 Civil Rights Act is not limited to claims of "equal pay for equal worth," the standard required under the Equal Pay Act of 1963. The Gunther decision opened the door for filing suits under title VII. The Gunther holding was not a comparable worth one, but rather one in which the court narrowly ruled that title VII incorporated all the Affirmative defenses of the Equal Pay Act, but not the Equal Pay Act's standard of equal work.

Much of the current debate on comparable worth stems from a recent Washington State court decision. On December 14, 1983, U.S. District Judge Jack E. Tanner ordered the State to award back pay and higher wages to more than 15,000 of its employees, 90 percent of them women. His ruling was based on the alleged principle of "comparable pay" for "comparable work."

The lawsuit before Judge Tanner accused the State of sex discrimination in its pay practices, based on the fact that women as a class were paid less than men. It did not claim that women received less pay for doing equal work, or that their opportunities were somehow limited by the State—only that women were not paid the same as men for work that was claimed to be of comparable value. Tanner's ruling was based heavily on job evaluations conducted by "experts," who claimed that fields of work dominated by women consistently provided lower wages for work rated comparable to that in male-dominated fields.

The district court decision is presently on appeal to the ninth circuit. The comparable worth doctrine would impose extraordinary costs and distortions on the economy. We would face even more bureaucratic regulation because a governmental wage board would determine the so-called "fair" wage for work of comparable worth.

Collective bargaining unions would be superseded by governmental institutions in the wage-setting process. It could be irrelevant whether or not union concessions from profitable firms could be made. Only the worker's "objective" worth would matter. The union would become a "toothless watchdog" merely insuring the management paid the wages determined by the board of evaluators.

The increasing of wages due to the instituting of the comparable worth principle would be passed off to the consumer in the form of higher prices which means inflation.

We would also face reduced competitiveness in world markets. Higher wages mean higher costs to the producer, which in turn would most likely mean lower sales. Companies might choose to move their manufacturing abroad or contract jobs to foreign countries.

In addition, it would affect public employment in the United States. Pay increases in the public sector alone would force governments to increase spending, which means increasing taxes or cut services. If it extends to the private sector, initially there would be a drastic jump in the cost of doing business. These additional labor costs would bankrupt many firms with a high proportion of women in their work force, thereby leaving these women without a job. Employers could seek to replace many women with machines in cases where women's marginal productivity did not justify the increased rate in pay. "Comparable worth," in fact, would hurt the least-skilled women most, since their services would be the first to be priced out of the market.

What would be the cost of comparable worth? Judge Tanner's decision will cost the State of Washington between $500 and $800 million. Dan Glassner of the consulting firm, Hay Associates, stated in the February 6, 1984, Time article entitled, "A Worthy but Knotty Question" that it would cost $320 billion if other States adopted comparable worth legislation or similar court decisions were handed down. More importantly than the grave economic effects the comparable worth doctrine will cause, it will also mean a significant loss of freedom to many in the United States.

As Michael Brody said in his editorial in the November 21, 1983, issue of Barron's,

> Lacking the incentives provided by those wage differentials, which both feminist ideologes and opportunist politicians are now denouncing as discriminatory, neither women nor the national economy would go anywhere. But the relative worths which would be accorded to physical hardship, skilled training, academic credentials or whatever, cannot be determined by the federal courts or by committees of officials meeting in smoke-filled back rooms. Relative wages can be set, in the words of Adam Smith, "not by an accurate measure, but by the higgling and bargaining of the market, according to that sort of rough equality which, though not exact, is sufficient for carrying on the business of common life."

The social security problem within the ERA has largely been overlooked, but potentially is a very serious one. It boils down to the question: Would the ERA mandate social security benefits to all women regardless of whether they have worked outside of the home? Judy Goldsmith, president of the National Organization for Women (NOW), testified before the House Subcommittee on Civil and Constitutional Rights and stated that it would require the reexamination of the sexist assumption that underlies the social security system and require its reform. Prof. Francine Blau, also testifying before the subcommittee, stated that, "ERA would grant social security benefits to the homemaker on the basis of her economic contribution to the family rather than as an economic dependent."

This change in benefit distribution would place a very heavy financial strain on the social security system. It would mean significant cuts in benefits, an increase in taxes, or both, to meet this new demand. In its present precarious state, it is highly unlikely the social security system could withstand this financial blow.

While I have already discussed the impact of the ERA on insurance, a couple of points need to be mentioned. Both the proponents and opponents of the ERA acknowledge the ERA will mandate changes in insurance. Elaine Donnelly who testified before the subcommittee on October 20, 1983, stated:

> Ms. Goldsmith is absolutely right in her prediction that unisex insurance would be one of the inevitable results of the ERA, but she is absolutely wrong in implying the results would be beneficial to women.

I, along with other Members of Congress, actuaries, and economists agree with Elaine Donnelly that unisex insurance is detrimental to both men and women of our society. Since insurance is an industry regulated by State law, ERA would have a direct immediate effect. ERA would abolish rate classifications based on sex; it would do nothing to change the aggregate number of dollars that insurers must pay out in claims each year. All ERA would do is place an unfair disproportionate burden of the cost of insurance on female policyholders who deserve lower rates because they cost less to insure.

In a letter sponsored by Senator PACKWOOD and others to Edwin Meese, Counsellor to the President, regarding S. 2204, the Fair Insurance Practices Act, George K. Bernstein, an attorney for both the American Insurance Association and the New York State Teacher's Retirement System, stated that a unisex insurance system would force insurers to ignore women's lower accident experience and thereby charge them at least $700 million a year more in auto insurance. If life insurers are forbidden to credit women with their greater life expectancy, women would be compelled to pay $260 more for life insurance.

If a Federal court rules under the ERA that even small pension plans must pay out equal monthly benefits for which moneys were not collected in previous years, the result would be insolvency or drastic reduction in reserve funds. These funds are valuable sources of capital for mortgages and business loans which create jobs.

In conclusion, let me say that the dramatic economic effects of the ERA should cause one to take a serious second look before passing the ERA in its present nonamended form. I believe that this special order as well as the previous ones have demonstrated the need for the amending process to be allowed on the House floor when House Joint Resolution 1 is once again considered.

May 7, 1971.

Hon. Don Edwards,
Chairman, Subcommittee No. 4, House Judiciary Committee, House of Representatives, Washington, D.C.

Dear Mr. Chairman: This letter is in response to your request during my testimony on H.J. Res. 208 and H.R. 916 that we submit a memorandum detailing the effect of enactment of the Equal Rights Amendment on several areas of law: "public education, the military draft, the various state protection laws, correctional institutions, administration of justice, domestic relations." You further requested that we specify any areas of uncertainty.

Since a number of versions of the amendment have been introduced, we shall set out the version embodied in H.J. Res. 208, on which we were asked to testify:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.[1]
>
> Section 3. This amendment shall take effect two years after the date of ratification.[2]

Before speaking for the Department of Justice on the probable effects of the Equal Rights Amendment we should say something about what we conceive to be the proper role of the Department in the amendment process. As we said in our testimony on April 1, the value of the Attorney General's legal opinion generally derives from the same source as the value of any lawyer's opinion, from an examination of cases and other research materials. Relying solely on the language "equality of rights under the law", we cannot say with any greater certainty than other lawyers or scholars how its enactment will affect particular areas of the law. There are no cases. A scholarly examination of the legislative history of the amendment through the end of the last Congress serves little purpose: this year's still-to-be-written history would be the primary congressional reference in interpreting the amendment if it passed. In any event, last year's legislative history was unilluminating. There was no committee report in either the House or the Senate: the amendment's proponents on the floor and at the hearings reached no consensus on what it would accomplish.[3] Finally, as we pointed out in our earlier statement, the value of congressional history in interpreting constitutional amendment is limited.

Because the Department's opinion might be of considerable importance in interpreting legislative history, we could attempt to deliver a self-fulfilling prophecy consisting of a declaration of what we would like, as a policy matter, to see the amendment accomplish. However, we do not believe that making legislative history, in that sense, is a proper role for the Department in the amendment process. We are thus left the task of rendering a legal opinion on the basis of inco   ive language, of inconclusive legislative materials, and of the literature of members of the women's movement who have sponsored such an amendment for half a century.

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[1] The enactment clause does not contain the "within their respective jurisdictions" language that has troubled witnesses in the past. *See, e.g.,* H.J. Res. 35.

[2] The 2-year delay meets the objection advanced to previous versions that some State Legislatures meet only every other year and would not have an opportunity to examine laws that might be affected. Finally, it does not contain the 7-year limit on ratification that some members of the women's movement have opposed. *See, e.g.,* H.J. Res. 231.

[3] *E.g.,* compare Rep. Griffiths' statement on August 10, 1970, at H 7953–54 with Senator Bayh's statement on October 7, 1970, at S 17340–43.

It is possible to differentiate two schools of thought on the meaning of the amendment.

> It can mean that any classification based on sex must be justified by some good (or very good, or compelling) reason, or it can mean that no such classification can pass muster.[4]

While some members of the women's movement undoubtedly want to enact a doctrinaire equality, last year's legislative history suggests that most proponents of the amendment subscribe to some sterner version of the first meaning.[5] However, as Professor Freund points out, when an effort was made to substitute equal-protection language for the traditional equal-rights language last fall—

> The most active groups behind the amendment * * * refused to accept the substitute. They protested that courts or legislatures might find compelling reasons for certain classifications, and this result was unacceptable.[6]

Certainly a fundamental tenet of the amendment's supporters has been that a person must be judged by his individual qualifications, not by generalizations about his sex. Overall, we think the standard most likely to be applied by the courts is a suspect classification sort of test. The burden would be heavily on the state to justify a classification by sex.

Relying on that assumption, as we must rely on some assumption to answer these questions, we turn to an examination of the six categories of laws specified in your request.

I. *Public Education*

The first question is whether maintenance of "separate-but-equal" public schools and state universities for men and women would be permissible.[7] It appears to us probable that the courts will interpret the equal rights amendment to prohibit the maintenance of separate men's and women's public schools and universities. It is difficult to see a compelling reason for maintaining separate campuses or elementary and secondary schools for men and women. Individual preference honored by tradition is probably not sufficient.

Perhaps more difficult questions are presented when it comes to segregating particular school activities by sex. While the amendment would probably prohibit segregation by sex of home economics and industrial arts classes, what will be its effect on physical education classes and competitive sports? As a practical matter, integration of the sexes on high school and college basketball and track teams would deprive almost all female students of the opportunity to compete in those sports. Even if this is enough to exempt separate men's and women's athletic events, must qualified women be allowed to compete where there is only a men's team? We do not believe the answer to those questions is certain.

Certainly the amendment would prohibit the use of different admissions standards for men and women—at all levels of public education. And it would require equal employment opportunities at all levels of public educational institutions, both for faculty and for staff.

II. *The Military Draft*

The question here is whether Congress would be required either to draft both men and women or to draft no one. A closely related question is whether Congress must permit women to volunteer on an equal basis for all sorts of military service, including combat duty. We believe that the likely result of passage of the equal rights amendment is to require both of those results.[8] As has been pointed out by many of the amendment's supporters' that would not require or permit women any more than men to undertake duties for which they are physically unqualified under some generally applied standard.

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[4] Freund, The Equal Rights Amendment is not the Way, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 234, 237 (1971). This article and four other articles in Issue 2 of Volume 6 of the Harvard Civil Rights-Civil Liberties Law Review are expansions and revisions of testimony given by the authors at least year's Senate hearings on the Equal Rights Amendment. Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. (1970).

[5] *See* the statements of Rep. Griffiths and Sen. Bayh cited *supra*. *See also* Citizens' Advisory Council on the Status of Women, A Memorandum on the Proposed Equal Rights Amendment to the Constitution 14: "Separation of the sexes would be forbidden under the amendment except in situations where the separation is shown to be necessary because of an overriding and compelling public interest and does not deny individual rights and liberties." That is said to permit, at least, the maintenance of separate public restrooms.

[6] Freund, *supra*, at 238.

[7] The Supreme Court recently indicated that a separate women's campus in a state college system is permissible under the 14th Amendment. *See Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd* March 8, 1971, 39 L.W. 3384.

[8] *But see* Senator Bayh, *supra*, note 3, at S 17341.

To what extent such integration of the services would extend to living conditions and training and working units is uncertain. Proponents have indicated that some segregation would be permissible.[9]

III. *The Various State Protection Laws*

Many States have a number of laws ostensibly protecting female members of the labor force. Local notions of which women employees should be protected against what vary. Laws applying only to women or directly to women still on the books include laws relating to minimum wages, maximum hours, overtime compensation, rest and meal periods, industrial homework, night work, employment before and after childbirth, seating and washroom facilities, weight-lifting limits and occupational limitations. For a listing of such state laws, see Congressional Record October 7, 1970, S 17349–52, S 17354–55.

Many of those laws are already of doubtful enforceability under Title VII of the 1964 Civil Rights Act.[10]

It seems relatively clear that most if not all of such protective laws applying only to women would be invalid under the proposed amendment. The difficult question is what would be the consequence of finding such laws invalid when applied only to women. Some proponents have attempted to apply a benefit-burden test: genuine benefits would be extended to men, burdens would simply be stricken. There are a number of problems going beyond even the difficulty of determining which laws impose a burden and which extend a benefit. In fact many of the laws are seen as a burden on women chiefly because they put them at a competitive disadvantage with men. If the options are simply to apply a given protective law (*e.g.*, minimum wage) to all or to none, a court required to decide whether it was a benefit or a burden would be forced to decide a much debated social issue quite unrelated to sex discrimination. Another problem with that solution is that courts would probably be far more hesitant to extend to the male majority a law originally passed to "protect" a minority of female employees than to eliminate the "benefit" for the women. To extend a maximum hour law to men, for example, would seem more like judicial legislation than to strike it down as to women.

In sum, we believe the likely effect of the amendment would be to subject women to the labor rules currently applicable to men.

IV. *Correctional Institutions*

Here the questions would appear to be whether separate systems may be maintained for men and women and to what extent men and women must be integrated within a system.

We do not believe either of those questions can be answered with any certainty. At a minimum it would appear permissible under the proposed amendment to separate men and women to the extent necessary to prevent further crimes, such as rape and prostitution, as male prisoners are now to some degree separated to prevent homosexual assaults.[11] It has further been suggested by supporters of the amendment that separation would be permissible to the extent necessary to protect a competing right of privacy.[12] To what extent recognition of the necessity of some degree of separation of some prisoners could be generalized to permit separation of all prisoners or maintenance of separate systems is, we believe, uncertain.

V. *Administration of Justice*

This question refers to an assortment of statutory and common law rules, which differentiate between men and women in giving access to the courts and between their rights and liabilities once they are there.[13]

As we noted in our discussion of section 6 of H.R. 916, a number of state criminal statutes imposing different criminal penalties for men and women have already been declared invalid by lower courts under the 14th amendment. Imposition of different penalties for the same crime would almost certainly be invalid under the proposed amendment. The amendment would require a sentencing court to apply the less onerous penalty provisions, since the court could not subject a defendant to heavier penalties than the statute applying to his sex provided.

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[9] *See* Emerson, In Support of the Equal Rights Amendment, 6 Harv. Civ.-Rights and Civ.-Lib. L. Rev. 225, 231–32 (1971) (relying on a competing constitutional right of privacy).

[10] *See* the EEOC Regulation concerning sex as a bona fide occupational qualification, 29 C.F.R. 1604.1(b) (1970).

[11] But what about assaults resulting from jealousy; fornication, adultery?

[12] *See* Emerson, *supra*, note 9. Of course, the privacy argument does not meet the problem of men and women prisoners who are willing to waive that right. *See* Freund, *supra*, note 1, at 240–41.

[13] *See, e.g., Nickel v. Hardware Mutual Casualty Co.*, 269 Wis. 647, 70 N.W. 2d 205 (1955) (wife has no corresponding claim for loss of consortium); laws imposing different criminal penalties for the same act on men and women

When an action for alienation of affections or recovery for loss of consortium is available to men but not to women, the amendment would probably require the action to be available to both sexes or neither. We do not think it can be said with certainty which of the two possibilities would be chosen.

Certain defenses to criminal prosecutions are available to one sex but not the other. In some states, for example, a women who commits a crime may use her husband's presence at the scene as a defense.[16] A man who kills his wife's lover may be entitled to an instruction his wife would not have been entitled to had she killed her husband's mistress.[17] Those rules would appear to have to be brought into parity for men and women under the proposed amendment, but we do not think it is clear which of the two possibilities a court would choose.

Finally some criminal laws make certain actions an offense for only one sex, for example, beggary, child abandonment. Again, those laws would appear to have to be brought into parity. Since the crime could not be created by the court for the other sex, the amendment would probably be interpreted to prohibit all prosecutions.

VI. *Domestic Relations*

This question relates to a myriad of state laws governing marital duties and parental responsibilities. Perhaps the best approach is to take up several categories of those laws.

In most states a husband's duty to support his wife is different from her duty, if any, to support him. He generally must support her whether or not she is able to support herself. She, however, if she has any duty of support at all, must support him only if she is able to support him and he is unable to support himself. While it appears likely that the two spouses' duties of support would have to be brought in to some sort of parity, we cannot say with certainty what that would be. The demands of childbearing and rearing might be taken into consideration. But it would seem likely to us that the proposed amendment would, at least where a wife is not bearing or rearing children, prevent her from suing for support when she is able to support herself.[18]

Related statutes govern the conditions under which alimony may be awarded. Some states prohibit alimony decrees requiring payments by former wives to former husbands. Others distinguish between men and women in the grounds on which alimony may be granted. The former laws would probably be stricken down under the proposed amendment. The latter would probably have to be brought into some kind of parity. The likely result, as many proponents have suggested, would be to leave the matter to the discretion of the judge as a number of states have already done.

In many states wives' and husbands' grounds for divorce differ. Some differences derive from difference in the duty of support. Others result from the notion that the marital domicile is the husband's domicile. Thus, a divorce for abandonment may be available to the husband where it would not be available to the wife.

Again, while we think that such distinctions would be invalid under the amendment, we think it is uncertain what solution a court would adopt.

A final category relates to child custody. It seems likely that fathers would have to be given the same rights as against third parties that mothers currently enjoy. As between the parents, statutes preferring mothers over fathers would be probably invalid. As in the case of alimony, the matter of child custody would probably have to be left to the discretion of a judge operating in a framework of nondiscriminatory guidelines.

Sincerely,

WILLIAM H. REHNQUIST,
Assistant Attorney General,
Office of Legal Counsel.

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[16] *See e.g.*, *State v. Cauley*, 244 N.C. 701, 944 S.E. 2d 915 (1956).

[17] *See, e.g.*, Tex. Pen. Code art. 1220 (1961); *Reed v. State*, 123 Tex. Crim. 348, 59 S.W. 2d 122 (1933).

[18] Professor Freund is concerned that it would require a women to use child care facilities and work before she could demand support from her husband. *See* Freund, *supra*, note 4, at 239–40.

ERA and Insurance

The Equal Rights Amendment would have a massively adverse effect on young women buying automobile insurance, and on women of all ages buying life insurance, because the statistical facts that women have fewer accidents and tend to live longer than men could no longer be taken into consideration in the setting of lower rates for women. The insurance industry is built on a distribution of risk among groups in which the average cost of the benefits can be statistically and reliably predicted. Because we cannot predict which individuals will have the accidents, or which will die early, insurance costs are based on predictable costs of identifiable groups. The statistical evidence is overwhelming that women are entitled to lower rates because, as a group, they have fewer automobile accidents and they live longer.

Since insurance is an industry regulated by state law, ERA would have a direct and immediate effect. ERA would abolish rate classification based on sex (thereby creating a "unisex" insurance system), but it would do nothing to change the aggregate number of dollars that insurers must pay out in claims each year. All ERA would do is to place an unfair, disproportionate burden of the costs of insurance on female policyholders who deserve lower rates because they cost less to insure.

According to George K. Bernstein, an attorney for both the American Insurance Association and the New York State Teachers' Retirement System, a unisex insurance system would force insurers to ignore women's lower accident experience, and thereby charge them at least $700 million a year more for automobile insurance. If life insurers are forbidden to credit women with their greater life expectancy, women would be compelled to pay about $360 million more for life insurance.[1]

The proposed "Fair Insurance Practices Act," now under consideration by Congress, would have these costly effects on women. The Equal Rights Amendment, which would prohibit any difference of treatment on account of sex, would have the same hurtful effect on women, but ERA would be even more devastating because, as part of the Constitution, it would be practically irreversible.

Higher Auto Insurance Rates

For a preview of how ERA would affect insurance rates, we can look at the experience of the state of Michigan, which inserted a few words banning sex discrimination into the Essential Insurance Act, a comprehensive law passed in 1980 dealing with a number of other issues.

Before young women drivers in Michigan knew what had happened, many of them began getting letters from their insurance companies announcing that, because of the new Essential Insurance Act's ban against sex discrimination in rates, young women's rates would have to be raised in some age groupings by as much as 67% (State Farm), 84% (Allstate), or even 127% (Citizens Insurance).[2] Rate increases of $600 or more have forced many young Michigan women to reduce their auto accident coverage below an adequate level. The fact that this penalty was inflicted on them in the name of "women's rights" is of little consolation.

Depending on the age group and other factors such as marital status, sex-distinct automobile insurance rates across the country for young women under age 25 are from 18% to 66% lower than for young men under age 25. This is because young men under age 25 have 13% to 80% more accidents than female drivers (depending on their age group and other factors). According to a survey done by the Insurance Services Office in Washington, D.C., unisex tables would raise rates for a 23-year-old single woman in Hartford, Connecticut, by as much as $600; in Newark, New Jersey, by about $700 more per year; and in Philadelphia by $800 more per year.[3]

Proponents of ERA, and of unisex insurance legislation which would have the same effect, usually admit that women's rates would be increased but say they want the change anyway.

Higher Life Insurance Rates

When life insurance is priced separately for men and for women, rates for women are 15% to 25% less than for men because actuarial tables clearly show that women tend to live 3 to 8 years longer than men do. If a unisex standard were imposed, women would clearly have to pay more for the same coverage.

For example, according to Barbara J. Lautzenheiser, senior vice-president of Phoenix Mutual Life Insurance Company of Hartford, a 25-year-old non-smoking woman would have to pay $150 more for a one-year $50,000 term policy than she now would pay. A 35-year-old would pay $350 more. Rate increases in higher age brackets would be even steeper.[4]

Women of all ages, single and married, would pay more for life insurance—all in the name of "women's rights." These new costs would impact hardest on female heads of households and on low-income couples that depend on the wife's supplementary income.

No Trade-Off in Pensions

Employer-paid pension and health insurance costs are usually higher for women because women see their doctors more often than men (a factor which, incidentally, may contribute to their greater longevity). In order to compensate for the greater number of years of pension benefit payments to former employees who are female, some employers collect the same amount in pension payments from male and female employees but pay out smaller monthly benefits to women over a longer period of time.

The *total* benefits paid to a man and a woman are equal, but some feminists complain that the situation is "sex discriminatory." Their solution to this "problem" is radical—it would totally destroy the very principles on which all types of insurance are based.

But according to the President's Commission on Pension Policy,[3] only 39% of all women in the work force are covered by pension plans, and 95% of those already receive equal monthly pension benefits. (Most employer-funded pension and health insurance plans can offer equal pension benefits to men and women because they can use the advantage of a group rate to blend the actuarial differences between male and female employees.)

Therefore, a Congressional mandate for unisex pensions would advantage only 5% of 39%, or 2% of working women. The other 98% of the women would suffer by being forced to pay much higher automobile and life insurance rates, which are usually purchased by the individual *without* the advantage of group rates. Automobile insurance is a necessity for practically all women; and life insurance is considered essential by a sizeable proportion of women. The huge increases in these rates caused by ERA would be unavoidable and grievously unfair. It is clear that there would be no trade-off in pensions or health insurance that could possibly compensate for the devastating increases in automobile accident and life insurance rates.

Other Mischievous Effects

Other harmful effects of ERA with regard to insurance must be also considered:

1. If a Federal court rules under ERA that even small pension plans must pay out equal monthly benefits for which monies were not collected in previous years, the result could be insolvency or a drastic reduction in reserve funds. These funds are valuable sources of capital for mortgages and business loans, which create jobs.

2. If a small pension plan administrator decides to equalize things by cutting off benefits for both sexes after a fixed number of years, the result would be unfair to women who tend to live longer. This approach would allow employers to control their pension costs, but it would eliminate a valuable pension right now enjoyed by their female employees.

3. Among the major employers which do not now provide equal monthly pension benefits are states and municipalities. States and cities cannot increase their income by raising prices—they can only raise *taxes*. New York City Budget Director Alair Townsend recently testified[4] that passage of H.R. 100, Congressman John Dingell's bill to sex-neutralize insurance rates and pensions, would cost the city of New York $862 million—$650 million of which would go to men (benefits would be "topped up" instead of "leveled down"). The 1984 portion of that estimated cost, $82 million, would be the equivalent of 3,000 police officers, firefighters, or sanitation personnel.

4. ERA, which would mandate unisex rates for all types of insurance, would shift all control and regulation of insurance to Congress and the Federal courts. Heretofore, insurance has been regulated at the state level, and no convincing argument has been made that this power should be shifted to Washington, D.C.

5. It is probable that the definition of "sex" in unisex insurance legislation would include marital status. Marital status is a legitimate factor in determining risk, and the eliminaton of this factor would be costly to all consumers.

6. If sex and marital status are banned as legitimate factors in setting insurance rates, other identifiable factors such as age or condition of health would be challenged next—with probable success. In a news analysis of unisex insurance legislation, the *National Law Journal* reported:

> ***"It is the precedent a unisex law would set that makes insurers most fearful. Insurers worry 'that if they lose the right to use gender in setting rates, they will then lose the right to use age, marital status and other classifications.' "[7]***

7. Mandatory sex neutrality in the setting of rates and benefits would undermine the economic strength of a major private enterprise. The ultimate loser would not be the insurance industry, which would pass its costs along to consumers, but both men and women who would end up paying all the unnecessary additional costs.

References:

1. Letter to Edwin Meese, III, Counsellor to the President, January 4, 1983, regarding S. 2204, the Fair Insurance Practices Act, sponsored by Senator Robert Packwood and others, to mandate the sex-neutralization of all kinds of insurance rates and benefits.
2. Increases for Female Principal Operators, Age 16, as listed in *A Year of Change—The Essential Insurance Act of 1981*, Michigan Insurance Bureau, Exhibit V, p. 26. A preliminary filing by AAA of Michigan had originally stated a 195% (triple) increase for young married women under age 19.
3. Study prepared by Mavis A. Walters, senior vice president, Insurance Services Office, 910 17th Street, N.W., Suite 517, Washington, D.C. 20006.
4. Testimony before the House Subcommittee on Commerce, Transportation and Tourism, February 24, 1983, re H.R. 100, "Non-Discrimination in Insurance Act," page 8.
5. As quoted by Barbara Lautzenheiser in testimony cited above.
6. From the *MacNeil-Lehrer Report* on the House Commerce Subcommittee Hearings on "Unisex Insurance," February 22, 1983.
7. "The 'Unisex' Policy Uproar," *National Law Journal*, February 28, 1983.

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ERA/INSURANCE CONNECTION

There are three basic points about the ERA/insurance connection -- they apply to past ERA ratification campaigns, current campaigns for federal and state legislation to ban sex discrimination in insurance, and the present ERA campaign:

> ERA is a comprehensive ban on legal sex discrimination. Because it would invalidate laws and regulations permitting or requiring sex discrimination, ERA would invalidate in every state the sections of state insurance codes which permit or require sex discrimination in insurance.
>
> Because insurance is regulated at the state level, the insurance industry maintains notoriously strong and effective lobbies in every state to protect profits. The lobbies intensify effectiveness by supporting and shaping the activities of the National Association of Insurance Commissioners and the Conference of Insurance Legislators.
>
> Insurance lobbies fight any legislation making sex discrimination illegal which could affect insurance, e.g., banning sex discrimination in auto insurance prices. Because they are powerful and have well established systems for rewarding and punishing legislators, insurance lobbies can influence legislation quietly when overt opposition would be "socially unacceptable," to use their expression. Opposition to ERA was all in a day's work for them.

These basic points are highlighted in the attached newspaper items:

1. NOW ad, "WILL THE ERA BE SACRIFICED FOR THE INSURANCE NUMBERS GAME?" New York Times, June 3, 1982.
2. Editorial, "ERA SPOTLIGHT IS ON FLORIDA" St. Petersburg Times, June 7, 1982.
3. Editorial, "INSURORS TAKE THE EASY WAY" St. Petersburg Times, June 14, 1982.

The NOW ad was obviously a revelation to the St. Petersburg Times. The ad explained the mystery of the Florida legislature's blocking ERA in defiance of a large majority of the state's voters. In the editorials, the paper explained to its readers what the ad said and how that applied to Florida. These explanations of June 1982 still apply today.

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LEGAL ANALYSIS OF POTENTIAL IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT (ERA) UPON THE USE BY INSURANCE COMPANIES OF GENDER AS A RISK CLASSIFICATION

Karen J. Lewis
Legislative Attorney
American Law Division
March 31, 1983

BEST COPY AVAILABLE

LEGAL ANALYSIS OF POTENTIAL IMPACT OF THE PROPOSED EQUAL RIGHTS AMENDMENT (ERA) UPON THE USE BY INSURANCE COMPANIES OF GENDER AS A RISK CLASSIFICATION

This report will analyze the language in the proposed Equal Rights Amendment (ERA) in terms of what its potential impact might be upon the use by insurance companies of gender as a risk classification. Since the proposed constitutional amendment applies only to cases of discrimination involving governmental or state action, a discussion of the state action doctrine will be set forth in this analysis This will be followed by a review of the issue concerning whether the enforcement language in the proposal can be used by Congress to reach private action.

The proposed ERA provides in pertinent part:

> Section 1. Equality of rights under the law shall not be denied or abridged *by the United States or by any State* on account for sex.
>
> Section 2. *The Congress shall have the power to enforce, by appropriate legislation*, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification. (Emphasis supplied.)

This proposed constitutional amendment is based largely on Section 5 of the Fourteenth Amendment. That Amendment by its express terms provides that "[n]o State..." and "nor shall any State..." engage in the proscribed conduct. As was stated in one Supreme Court decision:

> [T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.
>
> *Shelley v. Kraemer*,
> 334 U.S. 1, 13 (1948).

Then, in another case, the Supreme Court pointed out:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws.
>
> *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

It is quite clear that when a state, through its legislature, commands a discriminatory result, that constitutes state action condemned by the first section of the Fourteenth Amendment, and the statute enacted is void. *United States* v. *Raines*, 362 U.S. 17, 25 (1960).[1] Justice Frankfurter once wrote, "the vital requirement is State responsibility that *somewhere, somehow*, to some extent, there be an infusion of conduct by officials, panoplied with state power, into any scheme" to deny protected rights. *Terry v. Adams*, 345 U.S. 461, 473 (1953).[2]

The complexity of the state action doctrine becomes apparent when the Court is confronted with challenges to conduct that is not so clearly the action of a state but is, perhaps, the action of a minor state official not authorized so to act and perhaps forbidden to act in such a manner by state law, or is, perhaps on the other hand, the action of a private party who has some relationship with governmental authority.

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[1] A prime example is the statutory requirement of racially segregated schools condemned in *Brown v. Board of Education*, 347 U.S. 483 (1954).

[2] Justice Frankfurter wrote a concurring opinion in *Terry v. Adams*, and he was speaking specifically of the state action requirement of the Fifteenth Amendment.

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The continuum of state action ranges from obvious legislated denial of one of the guarantees of Section 1 of the Fourteenth Amendment to the point at which private action is no longer so significantly related to state action that the Amendment does not apply at all. When the discrimination is being practiced by private parties, the question is basically whether there has been sufficient state involvement to bring the Fourteenth Amendment into play. In short, the private action is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). There is no clear formula to apply to determine whether or not state action exists. The facts of each situation have to be examined separately.

The Court has made clear that governmental involvement with private persons or private corporations is not the crucial factor in determining the existence of state action. Instead, the Court has said that, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)(under the Due Process Clause). In other words, the state has to be involved with the particular activity of the institution that actually inflicted the injury on the plaintiff, i.e. the state action, and not the private, has to be the subject of the complaint.

It should also be noted that the receipt of federal funds alone does not imbue a private institution with state action. Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873 (5th Cir.), cert den., 423 U.S. 1000 (1975); Wahba v. New York Univ., 492 F.2d 96 (2nd Cir.), cert. den., 419 U.S. 874 (1974); N.Y.C. Jaycees v. U S. Jaycees, 512 F.2d 856 (2nd Cir. 1976).

In 1976, the Supreme Court narrowed or tightened the state action doctrine even further by holding that plaintiffs, seeking to have withdrawn governmental tax benefits accorded to private institutions that allegedly discriminated against complainants and thus involved the government in their actions, must in order to be able to bring their suit show that revocation of the benefit would cause the institutions to cease the complained of conduct. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). (See id. at 46, 63-64. Justice Brennan concurring and dissenting).

During the 1982 Term, the Supreme Court handed down three decisions which appear to be consistent with the trend of narrowing or tightening the state action doctrine: Blum, Commission of the New York State Department of Social Services v. Yaretsky, 50 U.S.L.W. 4859 (June 25, 1982) (no "state action" in nursing homes' decisions to discharge or transfer Medicaid patients to lower levels of care; thus, respondents failed to prove petitioners violated rights secured by the Fourteenth Amendment); Rendell-Baker v. Kohn, 50 U.S.L.W. 4825 (June 25, 1982)(a private school, whose income is derived primarily from public sources and which is regulated by public authorities, did not act "under color of state law" when it discharged certain employees); Lugar v. Edmondson Oil Co., Inc., 50 U.S.L.W. 4850 (June 25, 1982) (no "state action" insofar as petitioner alleged only misuse or abuse by respondents of Virginia Law; but "state action" exists to the extent that petitioner's complaint challenged the state statute as being procedurally defective under the Due Process Clause).

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In Blum v. Yaretsky, supra, the Court looked very carefully at the nursing homes and their specific actions in discharging or transferring Medicaid patients to lower levels of care. The precise question addressed was whether the state could be held responsible for those decisions so as to subject them to the strictures of the Fourteenth Amendment. In concluding that there was no "state action," the Court looked at the following: (1) the fact that nursing homes in New York are regulated by the State; (2) whether the state exercised coercive power or provided significant encouragement causing the nursing homes to so act; (3) whether the private entity, i.e. nursing homes, exercised powers that are traditionally the exclusive prerogative of the state. In its decision, the Court stated:

> These regulations do not require the nursing homes to rely on the forms in making discharge or transfer decisions, nor do they demonstrate that the State is responsible for the decision to discharge or transfer particular patients. Those decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State... nothing in the regulations authorizes the officials to approve or disapprove decisions either to retain or discharge particular patients, and petitioners specifically disclaim any such responsibility. Instead, the State is obliged to approve or disapprove continued payment of Medicaid benefits after a change in the patient's need for services... Adjustments in benefit levels in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision. As we have already concluded, this degree of involvement is too slim a basis on which to predicate a finding of state action in the decision itself...
>
> As we have previously held, privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of Burton. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-358. That

> programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.
>
> We are also unable to conclude that the nursing homes perform a function that has been "traditionally the exclusive prerogative of the State." Jackson v. Metropolitan Edison Co., supra, at 353.
>
> 50 U.S.L.W. 4859, 4863-4864.

Similarly, in Rendell-Baker v. Kohn, supra, decided on the same day as Blum v. Yaretsky, the Supreme Court invoked a very stringent interpretation of the state action doctrine. The Court addressed the question whether a private school, whose income comes primarily from public sources and which is regulated by public authorities, acted under color of state law when it discharged certain employees. The Court concluded that the school's action did not constitute state action, and in its rationale it relied to a great extent on Blum v. Yaretsky, supra. The Court stated specifically that:"... the school's receipt of public funds does not make the discharge decisions acts of the state." 50 U.S.L.W. 4825, 4828. The Court went on to point out:

> The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts. Id. at 4828.

In Rendell-Baker, the Court found that the discharge decisions made by the school personnel were neither compelled nor influenced by any state regulation. The Court observed:

> . . . in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various government agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action.
>
> Id. at 4828-4829.

The Court applied the "public function" test in Rendell-Baker in a very stringent manner also noting that the critical question was whether the function performed was traditionally the exclusive prerogative of the state. There was no denying that the education of these maladjusted children was a public function, but this was only the beginning of the Court's analysis. The Court wrote:

> Chapter 766 of the Massachusetts Act of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State... That a private entity performs a function which serves the public does not make its acts state action.
>
> Id. at 4829.

Finally, in Rendell-Baker, the Court held there was no "symbiotic" relationship between the state and the school. It found that the school's fiscal relationship with the state was no different from that of many contractors performing services for the government.

Thus, from the language quoted above in Blum v. Yaretsky and Rendell-Baker v. Kohn, it is apparent that the Supreme Court does not find state action present in given factual situations without first applying very strict standards. This is evident as well in the Lugar v. Edmondson Oil Co., Inc. case, 50 U.S.L.W. 4850, which it decided on the same day. The Court spelled out the stringent mode of analysis employed and the rationale behind it:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.
>
> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the state. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.
>
> 50 U.S.L.W. at 4853-4854.

A review of the three foregoing 1982 decisions by the Supreme Court indicates that the Court is going to examine a factual situation very closely before it determines that state action is present warranting the application of the protections of a constitutional amendment such as the Fourteenth Amendment.

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It is certainly clear from the language in the proposed ERA and from the fact that it is predicated on the Fourteenth Amendment to some extent that it covers situations where there is state action. The foregoing discussion, however, has shown that the Court has over the years narrowed its concept of what constitutes state action to warrant bringing the Fourteenth Amendment into play. Short of actual state enacted legislation meeting the requirements of the state action doctrine, its existence or presence becomes less clear, and courts have to examine the facts and weigh the circumstances in each situation.

In the case of determining what might be the potential impact of the proposed ERA upon the use by insurance companies of gender as a risk classification, one would have to carefully scrutinize the insurance company and its relationship vis a' vis the federal, state or local government. Most insurance companies are private entities which are actually regulated by the states. It would be accurate to say that the proposed ERA would not interfere with the practices of private insurance companies. In such instances, there would simply be no state action. Section 1 of the proposed ERA is prohibitory only upon the federal government and the state governments and on its face, does not reach private conduct. Thus, arguably, as with respect to Congress' enforcement power under Section 5 of the Fourteenth Amendment, Congress power under Section 2 of the proposed ERA to enforce Section 1 would be similarly limited. See Civil Rights Cases, 109 U.S. 11 (1883).[3]

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[3] Justice Harlan's dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action but also viewed places of public accommodation as serving a quasi-public function which satisfied the state action requirement. Id. at 46-48, 56-57.

The fact that there may be a question as to whether private discrimination can be reached under the Fourteenth Amendment exists by virtue of the lengthy statement Justice Brennan appended to the Court's decision in United States v. Guest, 383 U.S. 745 (1966). A majority of the Justices joined Brennan in arguing that Congress' power was not so narrow as to be limited by the state action requirement.

In United States v. Guest, the Court upheld an indictment under 18 U.S.C. 241, a statute imposing criminal penalties for certain civil rights violations. Specifically, section 241 prohibits conspiracies to deprive citizens of civil rights and is a felony offense. In Guest, the Court upheld an indictment under section 241 of six individuals who allegedly had conspired to deprive blacks of their right to use State facilities and to travel in interstate commerce. Although the Court read into the indictment an allegation of state action, six Justices expressed the view that Section 5 of the Fourteenth Amendment authorizes legislation proscribing wholly private conduct. Responding to language in Justice Stewart's opinion for the Court implying a "state action" limitation on Congress' legislative authority, Justice Brennan, joined by a majority of his brethren, argued for broader congressional authority:

> Although the Amendment itself... 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under the Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.
>
> 383 U.S. at 782.

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Within that authority is the "power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish [private] individuals" who would deny such access. Thus, under the Guest rationale, private conspiracies to interfere with equal protection or due process rights protected by the Fourteenth Amendment may be within the reach of Section 241. Nonetheless, in light of changes in the Court's membership and absent definitive adjudication, the matter is not free of all doubt. Furthermore, the limits and potential of that rationale are uncertain, whether it is only with regard to "state facilities" that Section 241 reaches private interference, or what "rights" are encompassed within the concept of "Fourteenth Amendment rights."

In addition, it must be emphasized that the consensus expressed by six Justices in Guest[4/] that Section 5 of the Fourteenth Amendment empowers the Congress to enact laws punishing all conspiracies, with or without state action, that interfere with Fourteenth Amendment rights was dicta in the case since Justice Stewart, who authored the Court's opinion, found the allegations sufficient to sustain a charge of State-sanctioned deprivation of equal protection rights that he apparently deemed essential to a Section 241 prosecution.[5/]

[4/] Clark, J., with the concurrence of Black and Fortas, JJ., joining the opinion of the Court, and Brennan, J., joined by Warren, Ch. J., and Douglas, J., concurring in part and dissenting in part.

[5/] In this opinion, Justice Stewart stated:

> In this connection, we emphasize that § 241 by its clear language incorporates no more than the Equal Protection Clause itself; the statute does not purport to give substantive, as opposed to remedial, implementation to any rights secured by that Clause... It is commonplace that rights under the Equal Protection Clause itself arise only where there has been

(Continued)

Moreover, the reported Federal court decisions since *Guest* to sustain a Section 241 prosecution based on due process or equal protection violations have involved alleged interference in State elections[6] and the right to a jury trial[7] where the requisite complicity of State officials to support a finding state action was present.

Thus, it can be said that the applicability of Section 241, or more fundamentally, the scope of Congress' authority to reach private conspiratorial conduct interfering with Fourteenth Amendment rights has yet to be definitely resolved.

In sum, on its face, the proposed ERA will reach only state action. It places a limitation on governmental entities, prohibiting gender-based discriminatory activities on their part. The proposed ERA provides that equality of rights under the law cannot "be denied or abridged *by the United States or by any State*" because of sex. (Emphasis supplied).

(Continued) involvement of the State or of one acting under color of its authority. The Equal Protection Clause 'does not... add anything to the rights which one citizen has under the Constitution against another.'... As Mr. Justice Douglas more recently put it, 'The Fourteenth Amendment protects the individual against *state action*, not against wrongs done by *individuals*.' (citations omitted)...

> This has been the view from the beginning.... It remains the Court's view today.
>
> 383 U.S. at 755.

At the same time, Justice Stewart narrowly limited his views to Section 241 and did not purport to address the question of what kinds of other and broader legislation Congress might constitutionally enact under §5 of the Fourteenth Amendment to implement that Clause or any other provision of the Amendment.

6/ *See*, e.g. *United States v. Stollings*, 501 F.2d 954 (4th Cir. 1974). *United States v. Anderson*, 481 F.2d 685 (4th Cir. 1973), aff'd 417 U.S. 211 (1974).

7/ *United States v. O'Dell*, 462 F.2d 224 (6th Cir. 1972); *United States v. Purvis*, 580 F.2d 853 (5th Cir. 1978).

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Similarly, the Fourteenth Amendment provides that no state action shall deprive any person of life, liberty or property without due process of law. As such, the potential impact of the proposed ERA on insurance companies using gender as a basis for risk calculation can only be determined after examining the specific factual circumstances surrounding the particular insurance company and its relationship vis a'vis the government--federal, state or local. As recent U.S. Supreme Court decisions indicate, the Court has tightened up on its interpretation of the state action doctrine. If state action exists, then the proposed ERA would apply. In the absence of state action, it is unsettled whether the enforcement authority in Section 2 of the proposed ERA, like Section 5 of the Fourteenth Amendment, can reach private action.

Pending before the 98th Congress are bills, such as H.R. 100 and S. 372, which would prohibit sex discrimination in insurance, along with race, color, religion and national origin. This proposed legislation is quite expansive in its scope and would apply to any insurer engaged in commerce. Thus, one would not initially have to determine whether the insurer was a "state actor" meeting the requirements of the state action doctrine. However, the latter would be an essential element for the application of the proposed ERA, as the discussion in this paper has indicated, and thus, the proposed ERA on its face, at least, would not appear to have as broad a reach as H.R. 100 and S. 372.

Karen J. Lewis

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American Law Division
March 31, 1983

[J-76-1984]
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

HARTFORD ACCIDENT AND INDEMNITY COMPANY	No. 55 E.D. Appeal Docket 1982
v.	Appeal from the Order of the Commonwealth Court dated March 10, 1982, entered at No. 1184 C.D. 1980, affirming the Order of the Insurance Commissioner dated April 17, 1980, entered at No. R78-7-2.
INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA	
PHILIP V. MATTES and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Intervenors	65 Pa. Commw. 249, 442 A.2d 382 (1982)
Appeal of HARTFORD ACCIDENT AND INDEMNITY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	ARGUED: October 20, 1983 REARGUED: April 10, 1984

OPINION

* * * * * * *

We must next consider whether the Commissioner was justified in looking to the Pennsylvania Equal Rights Amendment in his determination of whether Hartford's gender-based rate plan was "unfair." Appellants seek to characterize the Commissioner's disapproval of Hartford's rate plan as an unauthorized attempt to impose his personal theories and perceptions of social policy upon the insurance industry. We disagree. As we have already concluded, it was appropriate for the Commissioner to look beyond actuarial statistics in evaluating the fairness of Hartford's discriminatory rates. Since those rates were based on the gender of the insured, the Equal Rights Amendment was necessarily relevant.

The Equal Rights Amendment was adopted by the voters of this Commonwealth on May 18, 1971. The Amendment provides:

> **Prohibition against denial or abridgement of equality of rights because of sex**
>
> Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.
>
> Pa. Const. Art. I, § 28.

In *Henderson v. Henderson*, 458 Pa. 97, 327 A.2d 60 (1974), this Court explained the purpose and effect of the new constitutional amendment:

> The thrust of the Equal Rights Amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction. The sex of citizens of this Commonwealth is no longer a permissible factor in the determination of their legal rights and responsibilities. The law will not impose different benefits or burdens upon the members of a society based on the fact that they may be man or woman.
>
> *Id.* at 101, 327 A.2d at 62.

We have not hesitated to effectuate the Equal Rights Amendment's prohibition of sex discrimination by striking down statutes and common law doctrines "predicated upon traditional or stereotypic roles of men and women...." *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 299-300, 368 A.2d 635, 639 (1977) (plurality opinion) ("Tender years doctrine" offends concept of equality of the sexes embraced in Equal Rights Amendment.); *see* *Adoption of Walker*, 468 Pa. 165, 360 A.2d 603 (1976) (Adoption Act's failure to require parental consent of unwed father as well as unwed mother violates Equal Rights Amendment.); *Butler v. Butler*, 464 Pa. 522, 347 A.2d 477 (1975) (Presumption that where husband obtains his wife's property without adequate consideration a trust is created in his wife's favor abolished.); *Commonwealth v. Santiago*, 462 Pa. 216, 340 A.2d 440 (1975) (Doctrine of "coverture" requiring presumption that wife who commits crime in presence of husband was coerced by husband discarded.); *Di Florido v. Di Florido*; 459 Pa. 641, 331 A.2d 174 (1975) (Presumption that husband is owner of household goods used and possessed by both spouses abolished.); *Commonwealth v. Butler*, 458 Pa. 289, 328 A.2d 851 (1974) (Statutory scheme under which women are eligible for parole immediately upon incarceration while men must serve minimum sentence violates Equal Rights Amendment.); *Henderson v. Henderson*, *supra* (Statute providing for alimony pendente lite, counsel fees and expenses in divorce action for wife but not husband violates Equal Rights Amendment.); *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974) (Presumption that father must bear principal burden of support of minor children abolished.); *cf. Hopkins v. Blanco*, 457 Pa. 90, 320 A.2d 139 (1974) (Equal Rights Amendment requires that wife as well as husband be permitted to recover for loss of consortium.)

Gender-based rates such as Hartford's rely on and perpetuate stereotypes similar to those condemned in the above cases.

The efficacy of such rates is questionable even on the actuarial level.

> In terms of simplicity and consistency (i.e., stability and ease of verification), age, sex and marital status receive high marks as rating factors. This is not the case from the viewpoint of causality. Causality refers to the actual or implied behavioral relationship between a particular rating factor and loss potential. The longer a vehicle is on the road, for example, the more likely it is that the vehicle may be involved in a random traffic accident; thus, daily or annual total mileage may be viewed as a causal rating factor. To the extent that sex and marital status classifications may be defended on causal grounds, the implied behavioral relationships rely largely on questionable social stereotypes. . . . Given the significant changes in traditional sex roles and social attitudes which have occurred in recent years, justifications for rating plans on the grounds of such implied assumptions are unacceptable.
>
> . . . .
>
> . . . [P]ublic policy considerations require more adequate justification for rating factors than simple statistical correlation with loss; in this regard, the task force recommends consideration of criteria such as causality, reliability, social acceptability, and incentive value in judging the reasonableness of a classification system. Based on these criteria, the task force concludes that as rating characteristics, sex and marital status are seriously lacking in justification and are subject to strong public opposition, and should therefore be prohibited as classification factors.

> National Association of Insurance Commissioners. *Report of the Rates and Rating Procedures Task Force of the Automobile Insurance (D3) Subcommittee, November, 1978* at 5-6 (footnotes omitted).

As a matter of public policy, the Insurance Commissioner found that a rate plan based upon gender is offensive to the spirit of Article I, section 28. Appellants argue that Article I, section 28 is not self-executing. Furthermore, they attempt to employ the state action concept of our federal system and argue that here no such action occurred. These arguments are also misplaced in this context.

First, it is not a question as to whether or not Article I, section 28 is self-executing since we are here concerned with the proper interpretation of a legislative enactment. The question presented, properly phrased, is whether the term "unfairly discriminatory" must be read in light of the Equal Rights Amendment to our Pennsylvania Constitution. Unquestionably, sex discrimination in this Commonwealth is now unfair discrimination. It is a cardinal principle that ambiguous statutes should be read in a manner consonant with the Constitution. To read the term "unfairly discriminatory" as excluding sex discrimination would contradict the plain mandate of the Equal Rights Amendment to our Pennsylvania Constitution. Therefore, we must affirm the decision of the Insurance Commissioner. We must do so because the statute must be interpreted to include sex discrimination as one type of unfair discrimination, and not because the Commissioner has the power to implement the public policy of this Commonwealth in the absence of legislative direction.

Further, the notion that the interpretation of this insurance statute involves the concept of "state action" is incorrect in this context. The "state action" test is applied by the courts in determining whether, in a given case, a state's involvement in private activity is sufficient to justify the application of a federal constitutional prohibition of state action to that conduct. The rationale underlying the "state action" doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling.

The text of Article I, section 28 makes clear that its prohibition reaches sex discrimination "under the law." As such it circumscribes the conduct of state and local government entities and officials of all levels in their formulation, interpretation and enforcement of statutes, regulations, ordinances and other legislation as well as decisional law. The decision of the Commissioner in a matter brought pursuant to the Rate Act is not only "under the law" but also, to the extent his adjudication is precedent on the question decided, "the law."

The Commissioner, as a public official charged with the execution of the Rate Act and sworn to uphold the Constitution and laws of this Commonwealth, Pa. Const. Art. 6, § 3; Act of June 4, 1879, P.L. 99, § 1, 71 P.S. § 761 (1962), was constrained to conform his analysis of Hartford's rate plan and his interpretation of section 3(d) of the Rate Act to Article I, section 28.

Thus, in light of the Pennsylvania Constitution's clear and unqualified prohibition of discrimination "under the law" based upon gender, we conclude that the Commissioner's disapproval of Hartford's discriminatory sex-based rates on the ground they were "unfair" and contrary to established public policy was in conformity with section 3(d) of the Rate Act and an appropriate exercise of his statutory authority.

Accordingly, the Order of the Commonwealth Court affirming the adjudication of the Insurance Commissioner is affirmed.

* * * * * * *

CONCURRING OPINION

MR. JUSTICE FLAHERTY Filed: September 27, 1984.

I join in the opinion authored by Mr. Chief Justice Nix, but write separately to empasize that, were it not for the

Equal Rights Amendment, Pa. Const. Art. I, §28, resort to gender-based insurance rate classifications would not be "unfairly discriminatory" under 40 P.S. §1183(d) (1971), since such classifications may indeed be actuarily sound. Nevertheless, the Equal Rights Amendment was adopted as an expression of the people's will on gender-based classifications, and, constrained by this constitutional mandate that "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual," our role is not to seek to circumvent its effect.

MR. JUSTICE HUTCHINSON joins this concurring opinion.

* * * * * * *

J-76-84
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

HARTFORD ACCIDENT AND INDEMNITY COMPANY
v.
INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA

PHILIP V. MATTES and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Intervenors

Appeal of HARTFORD ACCIDENT AND INDEMNITY COMPANY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

No. 55 E. D. Appeal Dkt. 1982

Appeal from the Order of the Commonwealth Court dated March 10, 1982, entered at No. 1184 C.D. 1980, affirming the Order of the Insurance Commissioner dated April 17, 1980, entered at No. R78-7-2

65 Pa. Commonwealth Ct. 249, 442 A.2d 382 (1982)

ARGUED: October 20, 1983
REARGUED: April 10, 1984

CONCURRING OPINION

HUTCHINSON, J. **Filed: September 27, 1984**

I join both the Majority Opinion by the Chief Justice and the Concurring Opinion by Mr. Justice Flaherty. I add, however, that I believe the ratio decidendi of both those opinions lies solely in the interpretation of the phrase "unfairly discriminatory" contained in Section 3(d) of the Rate Act. "Unfairly discriminatory" as a linguistic construct is, like "due process", available for use in accommodating the changes in policy required by changing social conditions. Such constructs are indispensable in a government based on a written constitution. They enable its fundamental precepts to survive, even as their application alters under technological and social change.

This is not to say that the courts are free to rewrite the meaning of a constitution or statute at will. However, when a change in social policy in response to changed conditions has been objectively demonstrated by the people's adoption of a constitutional amendment, it is incumbent upon the courts to read existing statutes in the light of the people's newly enunciated policy.

The wisdom of that policy is no longer an issue in Pennsylvania. Nationally, the debate over the desirability of an equal rights amendment still rages in the political arena. Indeed, its proponents have recently suffered a defeat at that level in their efforts to write that policy into the federal constitution. For better or for worse, however, Pennsylvania has settled that issue in favor of ERA.

Thirteen years after our adoption of Section 28 of Article I, the Pennsylvania Equal Rights Amendment, I believe we must honor its command and consider sex discrimination of any kind "unfairly discriminatory" unless the legislature plainly tells us otherwise. Absent at least a causal relation between sex and accident incidence a difference in auto insurance rates between men and women is plainly an unfair discrimination based on sex. No causal connection is shown on this record. What does appear is only a statistical correlation between sex and the incidence of auto accidents. This correlation simply provides a convenient measuring rod for setting rate differentials occasioned by other factors not so easily identified or quantified. Such considerations of convenience are not enough to stand in the face of our ERA. Given our ERA's clear statement of public policy in Pennsylvania, I see no need to raise potential federal questions of (a) whether the setting of insurance rates involves "state action", (b) whether this state should adopt the standards developed under the Fourteenth Amendment for detecting its presence or (c) how the standards should be defined in the light of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and Shelley v. Kraemer, 334 U.S. 1 (1948). On those issues I express no opinion, and, believing the Majority Opinion also refrains from such speculation, I join it.

I also join Mr. Justice Flaherty because without the Pennsylvania ERA, or some other affirmative statement of legislative policy, the Insurance Commissioner would lack the authority to redefine the statutory phrase "unfairly discriminatory" in the face of the insurance industry's long standing practice of utilizing gender based rate differentials. We are obligated to affirm his action only because the ERA objectively demonstrates, in the most forceful possible way, the feeling of the people of this state that sex discrimination is unfair.

MR. JUSTICE FLAHERTY joins this Concurring Opinion.

OCT. 21 1976

Impact ERA
Limitations and Possibilities

edited by
The Equal Rights Amendment Project
of the
California Commission on the Status of Women

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The Impact of the ERA on Financial Individual Rights: Sex Averaging in Insurance

Barbara A. Brown and Ann E. Freedman

I. Introduction

This article discusses the application of the Equal Rights Amendment to the sex-based rating systems currently employed by life insurance and annuity providers. These systems rely on sex-based classifications which are purportedly justified by physical differences between men and women. Sex classifications in insurance and annuity rating have a significant discriminatory impact on individuals while appearing reasonable as applied to each sex as a whole. This article describes the nature and extent of sex discriminatory practices in this area and outlines the legal principles which will govern judicial and legislative implementation of the Equal Rights Amendment. It then argues that the ERA prohibits sex classifications of the type now used in insurance rating and that sex-blind systems are both fair and feasible.

The insurance industry has practiced pervasive discrimination against women in coverage, availability, underwriting practices, and rating. The form and extent of discrimination varies from one kind of insurance to another with perhaps the worst record of treatment of women by health and disability insurance providers. The practices of the industry have been documented thoroughly in several governmental reports, which show that, on the whole, the insurance industry has both neglected women as prospective clients and dealt with them less favorably.

The discrimination in insurance reflects and intensifies the discrimination women face in other areas such as employment, credit, domestic relations, and marital property. Several basic assumptions underlie current insurance practices. The first is that women are only marginally connected to the labor force and will therefore absent themselves and overutilize insurance more than men. This assumption leads companies to conclude that women are poor risks for health and disability income plans and to charge them more for similar coverage, give shorter terms of coverage, and refuse automatic renewal options to women.

Second, insurance companies consider pregnancy and childbirth voluntary conditions rather than temporary disabilities. As a consequence, time lost from work for disabilities due to pregnancy and childbirth is excluded from disability insurance plans. Third, pregnancy is considered "acceptable" only for married women, and coverage for pregnancy, childbirth, abortion, and sterilization are often available only to married women at a prohibitive "family" rate based on two adults and two children.

Fourth, domestic work is not regarded as a risk whose loss should be compensated by insurance; only work outside the home in permanent "career-type" jobs is considered valuable enough to insure. Therefore, only women with such jobs can purchase disability or life insurance contracts. The benefits paid by those few disability plans that do compensate loss of work in the home pay only a small percentage of its value.

Fifth, divorced, separated, and even unmarried women are considered unstable. Their financial plight is intensified by the refusal of insurance companies to extend homeowners, automobile, or disability income plans to them. In addition, women suffer in terms of insurance coverage because they are clustered at the lower paid end of the labor market. They lose out on life insurance and annunity and pension plans which have a much higher proportion of employer contributions at the management and predominantly male levels in the economy, and, because of higher turnover rates and interruption of work for childbearing and rearing, they often run afoul of rigid pension vesting rules.

A great deal needs to be done to remedy these forms of discrimination by the insurance industry. Some states have passed, and numerous others are considering, legislation to prohibit sex discrimination in underwriting and availability. Courts, and in their wake, legislatures, are prohibiting the exclusion of pregnancy and maternity-related disabilities from disability income and sick leave plans. Laws or regulations should be promulgated to prohibit the exclusion of the medical costs of pregnancy, childbirth, abortion, and sterilization from standard single person health policies and to require those risks to be spread over the insured populations as a whole. Similarly, the insurance companies must be educated to the value of work within the home and the need to insure against risks to its performance on the same basis as work outside the home.

The last and most difficult sex distinction to attack, from the theoretical point of view, is the insurance industry's virtually universal practice of grouping men and women on the basis of sex to calculate premiums and payment in the forms of insurance that depend on life expectancy. The basic sex distinction works in the same way but with different results in the life insurance and annuity contexts. Women pay lower whole life insurance premiums than men because they live longer as a group and the companies have the use of the money longer before anticipated payout.[1]

Under one common type of annuity, a money-purchase or defined contribution plan, a specified contribution, usually a given percentage of pay, is made. No fixed benefits are guaranteed. Given the use of sex-based mortality tables, the money invested to produce payments after retirement until death will have to last longer for women than for men, so the monthly payments to a woman will be smaller than to a man of equal age. The real life span differential is used for computation in this context, so women suffer the full 5-to 7-year loss in their incremental payments. In the Teachers Insurance Annuity Association plan for college teachers, a woman choosing the single life option receives 13% less in each periodic payment than a man with an equal working record.[2] However, if either person dies prior to retirement, the death benefit to the survivors of each would be identical, since the amount of the total fund is the same. If the annuitant chooses a joint and survivor option with his or her spouse, the amount of the life-time annuity will generally be the same whether the employee was male or female.

Although the present value of the annuity is the same for all annuitants, there is a disincentive for a man to choose the survivor over the single life option. The addition of a female life to his own life increases greatly the anticipated payout period, so the level of monthly benefits during his life will diminish sizeably. Women, already receiving a smaller monthly benefit, lose little by the addition of a male life and therefore have no financial incentive to choose one option over the other. Thus, women are doubly disadvantaged. As annuitants, they receive a smaller periodic payment than men if they choose the single life plan. As spouses, they are less likely to receive protection because their husbands have an inducement to choose the single life option and its larger periodic payment.

A second type of plan is a formula or defined benefit plan, which specifies the rate of benefits, usually a certain amount multiplied by years of service. Contributions to the plan are not fixed but are based on the amount needed to provide the stated benefits. Male and female employees choosing a single life option under such a plan will receive equal benefits, but either employer or annuitant contributions to the plan must be more for women employees. The present value of the annuity at retirement will be calculated on the basis of sex group life expectancies, so that the woman's annuity will have greater present value. If an option other than single life, such as lump sum payment or distribution over a number of years, is chosen, the value of the woman's annuity will be greater.

Employers claim that sex grouping for fringe benefits related to life expectancy is rational (and therefore, legal) because women as a group do live longer than men. They also claim that prohibitions on sex grouping would be unfair to men. In a sex-blind system everyone would be paid a rate based on the longevity of the entire group; it would fall somewhere between the current male and female rates. Since on the average, men would receive this reduced benefit for shorter periods of time than women, some argue that they would thereby be subsidizing women.

Four federal agencies which monitor sex discrimination in the employment context have grappled with the problem of sex discrimination in life insurance and annuities. Three have thus far taken the position that employers can choose either to pay equal contributions or to provide equal benefits. Unfortunately, this approach allows employers to choose equal benefits in the life insurance context and equal contributions in the annuity context, thus denying women the benefit of their greater average longevity in the former and penalizing them in the latter.

However, the Equal Employment Opportunity Commission, which administers the most far-reaching law governing sex discrimination in employment, Title VII of the Civil Rights Act of 1964, has concluded that the Act's command of sex equality in the terms and conditions of employment means that there must be equal periodic benefits in pension or retirement plans. Greater cost for one sex is no defense. In rejecting an employer argument that the payment of equal monthly payments would discriminate in favor of women because they live longer than men, the Commission stated:

> The logic of this argument is that usually used to support discrimination: an appeal to the average characteristics of a particular sex, race, or other group protected under Title VII. But no person knows when he or she will die. All that [the employer's] sex-segregated actuarial tables purport to predict is risk spread over a large number of people; the tables do not predict the length of any particular individual's life. In our view, any use of sex-segregated tables that results in payment of different periodic pension benefits to males and females is highly suspect. Because actuarial tables do not predict the length of any individual's life, any claim that such tables may be used to assure equal pension payments over a lifetime between males and females must fail. In order to achieve compliance with section 703(a) of Title VII and with the Commission's Guidelines on Discrimination Because of Sex the periodic pension benefits paid to males and females in equivalent circumstances must be equal.[3]

A federal district court faced with a Title VII challenge to an employer-defined benefit plan which required higher contributions from women employees cited the EEOC decision quoted above in holding that the requirement of higher contributions in order to receive equal payments in a plan using sex-based tables was illegal sex discrimination against women employees.[4] Although the court and the EEOC both suggest strongly in their opinions that the use of unisex tables is the proper way to comply with the requirements of Title VII in this area, neither has as yet construed the law to require that method of attaining equality.

Constitutional litigation has not yet yielded any final decisions on the merits of the sex-based rating question. However, an arena in which there has been some activity is state statutory and administrative enforcement of antidiscrimination laws. A number of states have enacted laws which prohibit discrimination in coverage and underwriting policies. Although in many instances sex-based rate discrimination is expressly or by administrative interpretation excluded from the group of prohibited acts, the increased jurisdiction of agencies and strength of antidiscrimination guarantees suggest that state courts and agencies will be pressed to rule on the legality of sex-based acturial tables in the near future.

II. EQUAL RIGHTS AMENDMENT THEORY

Our society has traditionally used a wide variety of sex classifications to assign legal rights and duties. Such classifications may be characterized as legislative statements that, on the average, women are significantly different from men in a particular way. Sex classifications, like most legislative classifications, are imprecise; they range from those which are arbitrary or irrational to those which seem accurate for all but a small minority of women or men.

Significant progress toward eliminating sex discrimination has been made in the last few years due to the increasing willingness of legislators and judges to examine the facts instead of accepting rationalizations or stereotypes about the sexes as justifications for sex classifications. Unfortunately, classifications which bear no factual relationship to the abilities and characteristics of the average woman are not the only objectionable sex distinctions. Equally common are those sex classifications which are true for a large number of women—perhaps a majority or even 90%— but which have a detrimental impact on the remainder. These classifications are "rational" and, on cursory examination, most people may find them acceptable, but they deny qualified individuals rights and opportunities simply because they belong to a sex which usually does not display these qualifications.

Weightlifting limitations are a good example. In 1975, a weightlifting limit which prohibited all women workers from lifting weights of 5 lbs. or more would be considered by most people to be arbitrary and irrational. In contrast, a weightlifting limit which prohibited women from lifting weights in excess of 50 lbs. might be reasonable for the majority of women. However, individual women who would be capable of safely and efficiently lifting weights of that size or larger, perhaps as many as 40-45% of all women, would be harmed by such a limitation. At the same time, individual men who could not lift such weights safely would be denied the protection of the law solely on the basis of sex.

Under the Equal Rights Amendment, according to its legislative history, classification by sex is forbidden in any activity in which the state participates, whether or not the classification is "rational." This absolute prohibition is based on a political and moral commitment to principles of individuality and on the knowledge that sex classifications always mean denial to some people.

Classifications based on average physical differences between the sexes are no exception to this rule. However, the Equal Rights Amendment may be interpreted to permit physical differences between the sexes to be taken into account in two ways. One permissible way might be if the physical difference is a unique physical characteristic of either men or women. If the unique physical characteristic is closely related to the legislative purpose, and it is neither possible to use a sex neutral classification nor to test individuals, the legislature may classify on the basis of the unique physical characteristic. However, it would be quite unusual for a sex classification to be justified under this test.

The other way in which physical differences between the sexes may be taken into account is through classifications based directly on physical differences. For example, it is not permissible to exclude women from a football team, but it is permissible to set height and weight limits and exclude from participation persons outside the limits. However, such superficially neutral rules will be closely scrutinized to be sure that the physical limitations are justified by the legislative goal.[5]

The next section explores the application of this theory to sex classification in insurance rating and the design of sex neutral alternatives to current practices.

III. THE IMPACT OF THE EQUAL RIGHTS AMENDMENT

The use of gender as a rate setting factor is attractive to insurers because sex is easily ascertained and, until recently, has been widely perceived as a fair basis for classification. Sex-based acturial tables are built on the assumption that it is permissible to treat individual members of the class as though generalizations true of the group were true of all individuals. But the fact that the class generalization may be true on the average does not alter the personal injury to an individual who does not possess the class characteristic but who is treated as though she or he does. A woman executive with a real risk of early death is disadvantaged by a grouping which ascribes to her a long life expectancy, for it results in a small periodic annuity; a man who does not engage in similar work and who, consequently, may indeed have a long life expectancy, will be harmed by having to pay the high male rate to obtain life insurance. As in every other area, the vice of sex averaging is that the groups always include some people who do not have the feature assumed to be possessed by the whole sex group and exclude others who do.

The fact that the average difference in life expectancy between men and women as a group does not hold true for many individuals of both sexes is evident. The mortality curves of the sexes overlap significantly; both men and women die over a broad spread of years with more of each clustered within certain ranges but no clear line delineating all women from all men. Averaging inaccurately groups short-lived women with their sex group and long-lived men with theirs. In fact, a sizeable percentage of men and women will live the same length of time. One recent study of 1,000 men and 1,000 women aged 65 shows that the death ages of 62.1% of each group can be paired. Thirty-two percent of the women lived longer than this group and 32% of the men died earlier.[6] This suggests that a large percentage of those grouped together in sex-based tables do not share the characteristic assumed to be possessed by all members of that group.

The reason why actuarial grouping across sex lines appears problematic is that mortality is not like strength or most other physical or mental traits, for it cannot be tested with certainty in any individual and can only be based on guesses derived from earlier experience with persons who have similar features. It is much more difficult for an individual to assert that she will only live to 67, and therefore ought to receive large annuity payments, than to assert that she can lift 50 pounds, since the first assertion can at best only be supported by supposition based on her possession of certain characteristics which are associated with low life expectancy. There can never be a perfect actuarial correlation between risk and rate level; some persons in the group will always receive less for their payment than others, as risk spreading through a group is the essence of insurance. Therefore, it is difficult for any individual to show that he or she is in the wrong group or pays more than he or she ought. As long as the insurance companies group people on a basis (such as sex) that has some consistent predictive value, the group experience will always seem correct, and it will be difficult for those who constitute a subgroup with a different risk to identify themselves as such.

The Equal Rights Amendment precludes penalizing or rewarding women or men because of characteristics which predominate in one sex but are found in both, whether these are derived from social, economic, or cultural sources or from average physical differences between the sexes. Administrative convenience or other state interests do not justify sex-based classifications under this standard. Race, because it is as readily identifiable and as predictive a feature as sex, is also an administratively convenient way to predict life expectancy, yet society has chosen not to allow insurance rates to be calculated on that basis.

As already mentioned, one circumstance in which a physical difference between the sexes might conceivably be taken into account under the Equal Rights Amendment is when the difference derives from a unique physical characteristic. The mere existence of such a characteristic does not justify a sex classification however. Any reliance on it to justify a sex distinction must be strictly scrutinized to assure that the characteristic is closely related to the purpose of the legislation; that the classification is narrowly drawn and is not a camouflage for discrimination; and that no alternative with a lesser discriminatory impact is available.

At the present time, the source of the average differential in life expectancy between men and women is hotly disputed. Most insurance companies and feminists agree that at least a major proportion of it derives from factors which are not inherent in women or men but are more likely, for social and cultural reasons, to be found in one group or the other. Socioeconomic status accounts for large differences in life expectancy for both men and women. Environmental and personality factors deriving from childhood conditioning also play a large part. Boys are generally trained to be more daring, self-reliant, and achievement-oriented than girls. This leads them to more stressful occupations and to more risk-taking which incurs physical danger. Men as a group also smoke and drink more than women, and both of these are related to life expectancy. As more women choose these traditionally male life styles and roles, sex-based rating may become less accurate, thus denying increasing numbers of women the right to be grouped on the basis of the factors which really influence their life expectancy.

Insurance providers contend that these factors do not wholly or even largely determine the difference in mortality, which they claim has a biological or genetic origin. Some studies show an intractable difference between men and women when all other factors are controlled. For example, a group of monks and nuns leading very similar lives were found to have the same differences in mortality as men and women in the population at large.[7] Similarly, a study of men who became annuitants through their own employment and those who were covered through their wives as employees showed similar mortality experience for the two groups.[8] On the other hand, a draft paper by two biologists at the University of Pennsylvania questions the contention that biological or genetic differences between the sexes explain the mortality gap.[9]

While the evidence is not conclusive, it is worth exploring the outcome under the unique physical characteristics test, should such a characteristic be shown to be present in some or all members of one sex but none of the other. As noted above, the inquiry into the validity of the sex distinction depends on several factors, including the closeness of the relationship of the characteristic to the legislative purpose; the proportion of the problem solved by using the sex grouping; the possibility of the physical characteristic being used as a subterfuge for sex discrimination; the availability of less drastic alternatives, with impact on fewer persons or less severe impact on the whole group; and the importance of the legislative purpose being accomplished by the sex grouping.

Were there a physical characteristic in all women which always produced greater longevity by a certain number of years, then the aspect of the test which requires a close relationship between the characteristic and the purpose of the legislation would be satisfied. However, the proportion of the problem solved by reliance on the unique physical characteristic would not be great; many other factors found in some members of each sex have an equally great impact on longevity as do genetic attributes attaching only to members of one sex. There would be some evidence that sex discrimination is the motive for using sex-linked traits as the sole factor for predicting longevity, since other physical and cultural factors which also have a major impact on longevity, such as smoking or overweight, are not taken into account in the rate-setting process.[1] In addition, as discussed below, there are sex neutral alternatives to a system based on unique physical characteristics which would either diminish or eliminate sex discrimination in insurance rates while still allowing insurance companies to function properly. Thus, even if there are unique physical characteristics which explain some portion of the average difference in male and female mortality, it is probable that a court would find insurance and annuity rates unconstitutional under the Equal Rights Amendment.

Under the Equal Rights Amendment, therefore, the insurance providers will have to use a sex neutral system based on factors other than the sex of the insured. This alternative would mean that all insureds in a given group would receive the same monthly annuity benefit or amount of life insurance for the same premium. The rate for the group would be set on the basis of the average life expectancy of that group, which could be calculated either on an occupational or industry basis, on the basis of the composition of the group in terms of various risk factors other than sex, such as smoking, marital status, use of alcohol, and obesity, or on the basis of age alone.

Insurance companies frequently inquire about risk factors such as medical history, overweight, and smoking habits. At the present time, however, this information is used only to decide whether or not to insure a particular individual or to calculate the premiums of particular risky groups to whom only limited policies are available. For members of most groups, rates are determined without regard to information about particular individuals other than age and sex.

It seems likely, however, that the companies will choose to use the occupation-related factors, as a system based on personal health characteristics would be more expensive to administer. Although they could rely on written responses to questions about the presence of those physical conditions, the possibility of fraud or malingering would probably be considered too great to rely wholly on that source of information, and medical examinations of large numbers of people might become necessary. Occupational or industry grouping information, on the other hand, is easy to ascertain, and it is probable that because pension plans on an industry or union basis already exist, longevity statistics that would be useful as a basis for the ratings are currently available. Moreover, personal health factors presently tend in the same direction as sex, so that the rate categories they would produce might still be sex-segregated, still have a disparate impact on women, and might therefore still be constitutionally impermissible.

In addition to occupation-related factors for grouping, another sex neutral grouping is also attractive. Under it, no premium or benefit differences on the basis of sex or longevity-related characteristics, such as smoking, would be made. Distinctions in rates on the basis of age (and salary level for employment connected plans) would be made as under the present system as would different payments based on choice of payout options. There would thus be a single uniform rate for each age group to replace the current sex-based dual rating system.

One form of rating which would not be permissible would be group rating based on the proportion of men and women in the group. This type of rating still attributes to all women and all men the average characteristics of their sex because separate mortality tables based on sex are still used. It simply changes the level at which the sex-based calculation occurs from the determination of individual rates to the determination of group rates. Under this system, individuals would be penalized for annuity purposes if they belong to a group with many women and penalized for life insurance purposes if they belong to a group with many men. This result is no more permissible under the Equal Rights Amendment than individual sex-based rating.

Unisex rating, on the other hand, has several practical benefits in addition to its theoretical advantages. It removes any incentive on the part of employers to discriminate against women in hiring because of sex-based differences in the cost of fringe benefits. It encourages people to think in terms of individual differences rather than in overbroad sex groupings. And it means that union and employee bargaining for decent annuities will produce adequate benefits for employees of both sexes.

IV. CONCLUSION

Courts and legislatures have grown increasingly suspicious over the last several years of the facile use of sex classifications to allocate legal rights and duties. The Equal Rights Amendment represents a moral and political judgment that such classifications should no longer be employed. However, there has been a tendency on the part of many people to accept sex classifications purportedly justified by average physical differences between the sexes while rejecting those based on socioeconomic and cultural stereotypes. This examination of the use of classifications based on average physical differences in the difficult area of insurance demonstrates both the denial of individual rights which such classifications produce and the feasibility of designing sex neutral alternatives to current practices. The implementation of the equal rights principle in this area is the next step. The cost of change from established ways must not be allowed to justify a lessened commitment to equality for women and men in all areas of legal and political life.

Footnotes

1. However, women often do not receive the full benefits of the average age differential. In group policies, there is often no difference in rates on the basis of sex, and when there is, it is at most a three year setback instead of the real five to seven year gap in average life span.

2. Halperin, "Should Pension Benefits Depend upon Sex of the Recipient" (unpublished paper, 1975), p. 1 [hereinafter cited as Halperin].

3. EEOC Decision No. 74-118 2 CCH, Employ. Prac. Guide §6431 (1974), pp. 4152-53.

4. *Manhart v. City of Los Angeles,* Department of Water and Power, 387 F. Supp. 980 (C.D. Cal. 1975).

5. Such rules will also be examined to be sure that they are not subterfuges for sex discrimination and that there are no alternatives with a smaller impact on the protected class. In the football example, for instance, even if the height and weight limitations were not found to be an attempt to discriminate on the basis of sex, a school might be required to have two football teams, one for larger students and one for smaller students, as long as there is no physical reason why smaller students, among whom girls would predominate, could not play football with other small students.

6. This data comes from a study by Dr. Barbara Bergmann, quoted in Bernstein and Williams, *Title VII and the Problem of Sex Classification in Pension Programs,* 74 Col. L. Rev. 1203, 1221-22 (1974).

7. Halperin, *supra,* n. 2, p. 9; see also R. Duncan, *TIAA Female Mortality Experience* 1965-1970 (1972); Bernstein and Williams, *supra,* n. 6, p. 1207 n. 7.

8. Of course the men who qualified as spouses may have held similar jobs themselves and chosen their wives' plans for reasons other than they were not employed. See Kallman and Jarvik, *Individual Differences in Constitution and Genetic Background,* cited in Halperin, *supra,* n. 2, p. 16.

9. Waldron and Johnson, "Why Do Women Live Longer than Men?" (Univ. of Pa.). The biological or genetic difference is said to derive from the presence in men of the diminutive Y chromosome as opposed to two full X's and to the androgen and testosterone levels in men. The University of Pennsylvania paper finds no clear evidence that the hormonal difference contributes to sex differences in occurrence of arteriosclerotic heart disease or cancer. Conditions caused by X-linked recessive mutations constitute less than 2% of the excess of male death before the end of the reproductive years.

10. One physical characteristic which may be relevant to longevity is hormone level in the body. This is a unique physical characteristic in the sense that all men may have a level above a certain point and all women a level below that point, but individuals do vary greatly within the ranges for their sex. It could be argued that because of the individual range within each sex, making some men closer in level to some women than they are to men, insurance companies have a responsibility to base their rates on individual characteristics rather than on sex classifications.

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PRIVACY, PRISONS, AND THE ERA

Advocates of the Equal Rights Amendment (ERA) have gone to some considerable trouble to assure the American people that ratification of the ERA will not mean the abolition or abridgement of the right to personal privacy. The proponents have correctly perceived that the public does not wish to see changes in a number of private activities, and that the identification of the ERA with these changes would reduce the chances for ratification of the amendment.

Despite attempts to dismiss the ERA/privacy connection as a fixation on the "potty problem," there remains a lingering fear that the ERA will erase gender considerations that are at the base of our rights and privileges of privacy. This fear is founded on substantial evidence.

"Bona Fide Occupational Qualifications"

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) is the country's broadest prohibition against sex discrimination in employment. Broad as it is, it is not broad enough to satisfy those who want the federal government to assure absolute sexual equality in the workplace. There is in Title VII an explicit exception which permits sex-based discrimination "in those certain instances where...sex...is a bona fide occupational qualification [hereafter BFOQ--Ed.] reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. 2000e-2(e). The BFOQ is extremely narrow. "[T]he federal courts have agreed that it is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characteristics of the sexes."[1] Still, there are important BFOQ exceptions which the ERA would eliminate.

The evidence for this assertion is provided by the United States Commission on Civil Rights, whose job it is to study discrimination. The Commission has recently published its second report on the Equal Rights Amendment.[2] Speaking of "loopholes in antidiscrimination laws," the Commission makes what is fairly rare in the debate about the meaning of the Equal Rights Amendment—an unqualified statement about the ERA's meaning:

> Existing laws prohibiting sex-based discrimination by public employers contain many loopholes that would be closed by the Equal Rights Amendment....
>
> Yet another loophole that exists on the face of Title VII, and has been relied upon to deny jobs to women, allows sex to be considered a "bona fide occupational qualification" for a job. On the basis of this exception, the Supreme Court of the United States held that a woman could be denied a government job as a prison guard because of her "very womanhood."[3]

The Commission's statement has serious implications not only for privacy, but also for Congress's authority to define equality. According to the Commission, Congress—even under the authority of Section 2 of the Equal Rights Amendment, which gives Congress power to enforce the equality standard of Section 1—could not permit a bona fide occupational qualification exception to the unyielding rule requiring complete equality between the sexes.

The abolition of the BFOQ exception, which the Commission claims would be the result of ratification of the ERA, has implications which the American people may well reject. Let us examine them through the medium of actual cases where the BFOQ has been applied and upheld by the courts.

Personal Medical Privacy

Gregory Backus is a male nurse. When the Baptist Medical Center of Little Rock, Arkansas refused to grant Mr. Backus a position in its obstetrics and gynecology department (OB-GYN), Mr. Backus sued, alleging a violation of the prohibition against sex discrimination in employment contained in Title VII. The hospital was frank in its refusal to place Mr. Backus in the OB-GYN department. It told Mr. Backus that the hospital "did not employ male R.N.'s in the OB-GYN positions because of the concern of our female patients for privacy and personal dignity which make it impossible for a male employee to perform the duties of this position effectively."

As everyone knows, the functions of an OB-GYN nurse are inherently sensitive and intimate. The nurse's duties are inevitably linked with the patient's most intimate interests.

> An obstetrical patient constantly has her gentalia exposed.... Among the duties performed by the nurse in the labor room are the following: checking the cervix for dilation, shaving the perineum, giving an enema, assisting in the expulsion of the enema, and sterilizing the vaginal area. In the recovery room the nurse checks the patient for bleeding, gives massages to the uterus, and changes perineal pads
>
> At Baptist Medical Center obstetrical patients are randomly assigned to a nurse upon admittance to the hospital. This nurse is not selected by the patient and is a stranger to her....[4]

The court noted that a male nurse would always need to be accompanied by a female nurse or other female employee to protect the hospital from charges of molestation. This is standard medical procedure whenever an intimate examination is performed by a member of the opposite sex. This requirement would double the nursing cost to the patient.

The court upheld the hospital policy, finding that it was legitimate and important, and that it fell within the BFOQ exception. The court wrote:

> Due to the intimate touching required in labor and delivery, services of all male nurses are inappropriate. Male nurses are not inadequate due to some trait equated with their sex; rather, it is their very sex itself which makes all male nurses unacceptable.[5]

The language of the court runs counter to the equalitarian rhetoric of the feminists, the plain language of the Equal Rights Amendment, and the interpretation of the amendment made by the U.S. Commission of Civil Rights. Obstetrical patients might argue, however, that the language does not run counter to their interests.

A similar result was reached in Fesel v. Masonic Home of Delaware, Inc.[6] Mr. Fesel, a male, sought employment as a nurse's aide at the Masonic retirement home. The home had 30 guests, 22 of whom were female. The home showed that nurse's aides were involved in providing patients with intimate care and that the majority of female patients and their families would object to care provided by a male. The court upheld a BFOQ exception.

The Civil Rights Commission says that the ERA will eliminate the BFOQ exception. It is doubtful that the American people will tolerate enforcement of such an extreme sexual equality.

Juvenile Detention Centers

A few cases have recognized the importance of a BFOQ exception for persons supervising and counseling juveniles within a State's juvenile detention system. For example, in Long v. California State Personnel Board, the court decided that a female chaplain could be excluded from service in an all-male detention facility. This particular facility housed up to 400 young males charged with a variety of crimes, including rape. The court found that the presence of a female "could reasonably be expected to have three consequences, interference with privacy of wards, inability to control and discipline the wards, and danger of sexual attack."[7]

One of the more frequently cited cases in this area is *City of Philadelphia* v. *Penn. Human Relations Comm'n*., a case which dealt with a BFOQ under a Pennsylvania statute, not the Civil Rights Act of 1964, but one which has often been used in Title VII cases. In fact, the Pennsylvania court held "that the language used by the Pennsylvania legislature in providing the 'bona fide occupational qualification' exception demonstrated that it intended this term to be synonymous with, and interpreted in like manner as that same term is used in the Equal Employment Opportunity Act [Title VII of the Civil Rights Act of 1964]."[8]

In this case, the court upheld a City rule restricting supervisors in its youth center to persons of the same sex as the wards. Wards at the youth center generally ranged in age from seven to sixteen, although older juveniles were occasionally housed at the center. Charges against the wards included aggravated assault and battery, assault with intent to ravish, assault with intent to kill, and murder.

Supervisors are required to "directly observ[e]" daily showers "with the group moving about the living unit in varying degrees of undress. Conducting a search of the person for contraband, etc." was also a duty of a supervisor. The court correctly noted that if a BFOQ exception was not available for male supervisors of male wards, then male wards could be supervised by females and female wards could be supervised by males. The city feared that the female wards would make "charges of molestation or other immoral acts...for the sheer sake of harassment," thus making an already difficult administrative task even more difficult.

The court wrote:

> There is no question that a woman is equally qualified (or disqualified) to conduct a search for contraband as is a man. However, the vital factor that the [United States Equal Employment Opportunity] Commission here disregards is "who are the people being searched?" If sex is not "relevant" in the supervision of children who range in age from seven to sixteen in various stages of undress, where can it be?
>
> To subject a girl in this age group to a thorough search of her body could cause not only a temporary traumatic condition, but also permanent irreparable harm to her psyche. It is no different where females supervise male juveniles. To have a woman supervisor observe daily showers of the boys at a time in life when sex is a mysterious and often troubling force is to risk a permanent emotional impairment under the guise of equality.*
>
> The Commission in its ardor to correct discrimination in hiring based on sex has failed to give proper weight to the rights and the tremendous needs of those housed in the Youth Center.... The ultimate goal of the Center is to restore these children to society with a mental attitude which will allow them to function in a way beneficial to themselves and society. The right of these children to proper supervision is paramount. Therefore, it is paramount that these children be afforded every feasible individual right, including the right of privacy, which very well may be invaded if members of the opposite sex are permitted to inspect nude children at the Center.[9]
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>
> *The Commission suggests that no *facts* were adduced by the City in support of its contention that personal contact under very intimate circumstances must be limited to contacts between persons of the same sex. Once again, the Commission seeks *facts* in an area where *facts* are not available. Laws forbidding discrimination in hiring on the basis of sex do not purport to erase all differences between the sexes. These laws recognize that there are jobs for which one sex is inherently and biologically more qualified than those of the opposite sex. The biological difference between men and women which in turn produce psychological differences are the facts that justify limiting personal contact under intimate circumstances to those of the same sex. [footnote by court.]

The court's decision in this case is loaded with psychological jargon, but one does not have to accept all the judge's Freudian assumptions to recognize that he has hold of an important point: juvenile detainees are people, entitled to respect and privacy. Even if their psyches are not quite as tender and delicate as the judge thinks they are, it is important for the machinery of government to accord them the minimal respect all of us expect of each other. To subvert this minimum respect to the demands of ritual equalitarianism is to indulge in fetishism at the expense of real people.

The judge has bottomed his decision on the firm ground of the express statutory exception for bona fide occupational qualifications, and on the narrow judicial construction that has been made for that exception. It is revealing that an authoritative source, the U.S. Commission on Civil Rights, flatly declares that that narrow exception would be eliminated by the ERA, and the common sense of the judge (and the American people) ignored.

Prison Security

The "loophole" specifically mentioned by the Civil Rights Commission arises out of an Alabama case, Dothard v. Rawlinson. In Dothard, the U.S. Supreme Court let stand an Alabama regulation prohibiting opposite-sex guards from serving in "contact" positions in State prisons. The following description of Alabama prisons and the duties of Alabama prison guards is found in the Court's opinion:

> The environment in Alabama's penitentiaries is a peculiarly inhospitable one for human beings of whatever sex. Indeed, a Federal District Court has held that the conditions of confinement in the prisons of the State, characterized by "rampant violence" and a "jungle atmosphere," are constitutionally intolerable. [citation omitted.] The record in the present case shows that because of inadequate staff and facilities, no attempt is made in the four maximum-security male penitentiaries to classify or segregate inmates according to their offense or level of dangerousness--a procedure that, according to expert testimony, is essential to effective penological administration. Consequently, the estimated 20% of the male prisoners who are sex offenders are scattered throughout the penitentiaries' dormitory facilities.
>
> In this environment of violence and disorganization, it would be an oversimplifcation to characterize [Alabama's same-sex regulation] as an exercise in "romantic paternalism...."
>
> The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.* In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians.
>
> Appellee Rawlinson's own expert testified that dormitory housing for aggressive inmates poses a greater security problem than single-cell lockups, and further testified that it would be unwise to use women as guards in a prison where even 10% of the inmates had been convicted of sex crimes and were not segregated from the other prisoners. The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselour's responsibility.
>
> There was substantial testimony from experts on both sides of this litigation that the use of women as guards in "contact" positions under the existing conditions in Alabama maximum-security male penitentiaries would pose a substantial security problem, directly linked to the sex of the prison guard....[10]

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*The record contains evidence of an attack on a female clerical worker in an Alabama prison, and of an incident involving a woman student who was taken hostage during a visit to one of the maximum-security institutions. [footnote by court.]

Conclusions

If bona fide occupational qualifications are eliminated, and the U.S. Commission on Civil Rights assures us that the Equal Rights Amendment will eliminate them, there will be important—and unwanted—effects on medical privacy, juvenile institutions, prisons, and other areas of American life.

As the examples discussed in this paper make plain, the concept of equality embodied in the Equal Rights Amendment, as explicated by its advocates, is not always compatible with privacy as understood by the average American. The United States legal system currently allows the competing interests of equality and privacy to be worked out in a reasonable manner, with Congress establishing a high, but not totally impassable, wall against sex discrimination in employment. The plain language of the ERA provides no basis for reasonable exceptions.

Will the courts permit reasonable exceptions anyway? The United States Commission on Civil Rights says "no," and it says so plainly and unequivocally.

FOOTNOTES

1. Dothard, Director, Dep't of Public Safety of Alabama, et al. v. Rawlinson, et al., 433 U.S. 321 (1977). For a discussion of the BFOQ rule in federal courts, see 433 U.S. 332-334.

2. The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under the Constitution, United States Commission on Civil Rights, June 1981, Clearinghouse Publication 68.

3. Ibid, pp. 8-9, emphasis added, footnote omitted.

4. Backus v. Baptist Medical Center, 510 F. Supp. 1191 (1981). See at 1193.

5. Ibid at 1195.

6. Fesel v. Masonic Home of Delaware, Inc. 447 F. Supp. 1346 (1978 USDC D Dela.).

7. Long v. Calif. State Personnel Board, 116 Cal. Rpt. 562, 41 Cal. App. 3d 1000 (Ct. of App., 3d Dist., 1974). Hearing denied 11 Dec. 1974. See at 116 Cal. 570.

8. City of Phila. v. Penn. Human Relations Commission, 7 Pa. Cmwlth. 500, 300 A. 2d 97 (Commonwealth Court of Penna., 1973). See at 300 A. 2d 101.

9. Ibid. at 102-103.

10. Dothard, op cit. at 334-336.

This is the second in a series of occasional papers on major issues of public policy published by United Families Foundation. It does not necessarily reflect the views of UFF, and should not be construed as an attempt to aid or hinder the passage of any proposal before Congress or any State legislature.

[From the Wall Street Journal, Feb. 5, 1984]

LIBERTY & EQUALITY FOR FRATERNITIES

(By George S. T[illegible])

I am sure your editorial Aside anent Amherst fraternities (Feb. 23) was meant to be amusing, but it merely points up the fact that Orwell's Big Brother may not be here in 1984 in every facet of society, but is certainly alive and well on many college campuses.

The institutions of higher learning, supposedly laboratories for teaching democracy, are themselves authoritarian in the highest degree. The right to peaceably assemble has been one of the cherished freedoms guaranteed by our constitution, but it does not exist on the college campus. Not only at Amherst, but at Colby, and previously at Williams has a faculty decided how the students may gather and live.

If a reason is sought, it could be the fact that survey after survey has indicated that the political orientation of academic faculty on most campuses, and especially in the prestigious colleges of the Eastern seaboard, is far left of center. These faculty members have always looked on fraternities as bastions of conservatism, and have seized every opportunity to discredit them or destroy them.

Feminists too, have tried to destroy the fraternities, and have pushed for co-educational living groups. Could this be in explanation for the fact that promiscuity and abortions are at an all-time high on campuses? It required a specific exemption for social fraternities and sororities in the Civil Rights Act to permit single-sex organizations, but of course, if ERA is enacted, this will be out the window.

On one campus, I have been told, an attempt is being made to outlaw a group which requires a belief in a Supreme Being, because it discriminates against atheists and agnostics, but the gay rights groups, which are certainly limiting, are encouraged. Maybe President Reagan, a staunch fraternity man, with his interest in voluntary prayer in schools, ought to look into the rights of students to assemble and form their own groups, and withhold funds where this fundamental right is threatened.

[From the Washington Post, Sept. 14, 1984]

BURNING TREE TAX EXEMPTION RULED ILLEGAL

(By Nancy Lewis and Victoria Churchville)

A Montgomery County Circuit judge ruled yesterday that the so-called Burning Tree Club "loophole" in a Maryland tax-exemption law is unconstitutional and that the club is not eligible for such favored status because it discriminates against women.

Judge Irma W. Raker ordered the state not to grant the tax exemption to the club "so long as it practices any form of discrimination in granting membership or guest privileges," but she did not require the all-male club to accept women for membership.

The ruling means that the 62-year-old club, which occupies about 225 prime acres at Burdette and River roads and Interstate 495 in Bethesda, must be assessed at the rate for its "highest and best use," rather than as a country club, which had exempted it from taxation on 200 acres. The value of the club's tax exemption this year was about $186,000.

Burning Tree, known as the "club of presidents" because of its elite membership and its tradition of granting honorary privileges to top government officials, will appeal the ruling "in due course," according to former attorney general Benjamin Civiletti, who represented the club in the case.

Civiletti said in a prepared statement that club members "believe very strongly that their membership policy is protected by the freedom of association guaranteed by the United States Constitution."

At least one Burning Tree member indicated yesterday that he thinks the all-male exclusivity of the club is worth paying extra taxes to preserve.

U.S. Sen. Barry Goldwater (R-Ariz.), a Burning Tree member for 20 years, said the loss of the annual tax break "will not make or break the club. It might make the dues a little higher."

"I don't know why a woman would want to join an all-male club," said Goldwater. "Frankly, if they admitted women, I'd leave."

Goldwater added: "They should find out what the tax is, divide it by the number of members and then add that on to everyone's dues. That shouldn't be too terribly much."

In her 18-page ruling, Raker held that the "primary-purpose provision" of the state law, which extended the country club tax exemption to single-sex clubs that were established as such, conflicts with the state's Equal Rights Amendment and is therefore "null and void."

The lawsuit, brought against the state and the club by state Sen. Stewart Bainum Jr. and his sister, Barbara Bainum Renschler, is the latest chapter in an intensive three-year battle over the club's tax-exempt status.

Their lawsuit had challenged the loophole and had asked that Renschler's application for membership at the club be considered.

Burning Tree is one of the premier golf clubs in the Washington area. Among its 637 members last year were House Speaker Thomas P. (Tip) O'Neill Jr., Vice President Bush and Treasury Secretary Donald Ragan. The three were honorary members who enjoy the club's privileges but are exempt from paying the $1,700 annual membership dues and $12,000 initiation fee.

Traditionally, congressional leaders, Cabinet members and Supreme Court justices have been invited to join Burning Tree. But modern times have spoiled some of the club's treasured traditions; when President Dwight D. Eisenhower appointed Oveta Culp Hobby secretary of the Department of Health, Education and Welfare, she became the first Cabinet member not invited to join the club or attend its annual cocktail party for Cabinet members.

The Burning Tree controversy springs from a 1965 Maryland law that provides country clubs economic protection against high taxes that might force conversion of their "open spaces" to "more intensive or different uses" such as commercial or residential development.

The law authorizes the state to negotiate an agreement with such clubs allowing deferral of much of their tax bill until the land is converted to another use. The original law contains no ban on discrimination by clubs granted deferral.

But in 1972, the state enacted an Equal Rights Amendment barring sex discrimination.

The tax-exemption statute was amended in 1974 to include bans on discrimination because of race, color, creed, sex, or national origin. But a provision stated that the sex discrimination ban did not apply "to any club whose facilities are operated with the primary purpose, as determined by the attorney general, to serve or benefit members of a particular sex. . . . "

Burning Tree is the only club in the state that meets this criterion. The latest contract between the club and the state was executed in 1981 and was to last 50 years.

In defending the lawsuit, Civiletti had argued that the "loophole" was not discriminatory because it "applies equally to country clubs benefiting only men and those benefiting only women" and that removing the club's tax exemption would "unconstitutionally" impair the 1981 contract.

The so-called "Burning Tree loophole" raised the ire of women's groups and others who complained that the taxpayers were, in effect, subsidizing a club that discriminates against women. The issue has been addressed, though never resolved, in various bills since 1981.

OHIO TASK FORCE ON IMPLEMENTATION OF EQUAL RIGHTS AMENDMENT (1975)
VERBATIM EXCERPTS

* * * * * * *

V. CHILD CARE

A. Inadequacy of services problem

The lack of adequate child care services in the State of Ohio raises ERA problems because the State's failure to recognize a need for insuring adequate child care is founded on sexstereotyped attitudes about both the "proper" roles of men and women and the "innate" abilities of mothers and fathers. Mothers have traditionally been considered the most qualified persons to raise children; as a result, mothers have been given the responsibility of full-time child care while fathers have been assigned the role of sole breadwinner. However, these traditional notions ignore the realities of today's world. Before the recent economic decline, it was estimated that almost five out of ten mothers with children under age eighteen were in the labor market. The axiom that "motherhood is the life work of women" no longer holds true for a large number of Ohio's mothers.

Many women are presently unable to assume the role of full time child caretaker for three major reasons. First, it is economically imperative for many mothers to work to support themselves and their families. With the rising divorce rate, the number of female-headed households is on the increase. In addition, many married mothers are forced to work because their husband's income alone is insufficient to meet the family's needs. Second, many mothers have personal or professional aspirations in addition to those of motherhood and desire to combine the rewards of child rearing with the challenge of participating in the adult world. Third, some mothers are emotionally, physically or mentally unable to cope with the responsibilities of full time child rearing.

Existing child care services are inadequate in terms of quantity, quality and cost. There are only approximately 60,000 slots in licensed day care facilities throughout the state; yet, there are approximately 250,000 children under age six whose mothers work.

The cost of quality child care to lower and middle income families is generally prohibitive. The cost of average quality day care both in Cuyahoga and Franklin Counties is said to be \$25–\$30 per child per week; for high quality service based on an assessment of the individual child's needs, the cost may be as high as \$50 per week.

Recommendation.—The Task Force recommends that the state set as a priority during the next biennium the establishment of high quality, universally available child care services that are funded in whole or in part by the State of Ohio.

Rationale.—The equality principle embodied in the ERA requires consideration of a new public policy on the issue of child care. Women who are mothers need to enjoy the same freedoms and opportunities as men who are fathers. Mothers who desire to engage in activities outside the home, either on a full or part time basis, must have access to child care services so that they can fulfill these professional, educational or personal goals. The thousands of mothers who are presently working to earn a living have a right to know that their children are being properly cared for while they are at work.

There are additional benefits to be gained by an improved system of child care. Child care services can help detect early childhood development problems at a time when corrective steps can be taken. In families where a parent or child has emotional, mental or physical problems, outside child care assistance can be extremely helpful. Most importantly, children who are presently receiving inadequate or nonexistent care while their parents work would benefit from the security and structure of a child care program. In the long run, the establishment of quality child care will help deter juvenile delinquency and emotional and mental health problems, as well as help strengthen the family.

In implementing the proposed recommendation, the following factors should be considered:

High quality: In order for child care to be of high quality, it must meet the particular needs of the individual child. It is therefore necessary that any child care plan provide a variety of programs. "Child care" need not connote a central facility housing dozens of children; there are a number of child care schemes which should be considered. For example, quality child care can be established on a neighborhood basis, in the homes of persons deemed qualified as child care workers. In addition, parents should be permitted to take a determinative role in choosing the type of child care setting best suited for their child. Parents should also be given the opportunity to actively participate in the operation, overall direction and evaluation of child care services.

Universally available: Quality child care must be available to all families who need such services, irrespective of their income level. The cost of child care should be shared by the state and the families, according to their ability to pay.

Access to child care should not be limited to families in which the parents are absent from the home on a full time basis. Many mothers need to and/or prefer to work only part time. Furthermore, child care should not be limited to those families in which the parent(s) are gainfully employed. Many mothers and fathers need to be free during portions of the day to pursue educational or personal goals and civic responsibilities.

An important factor in any child care plan is flexibility. Child care should be available to parents who work night or weekends shifts, and in cases of family emergencies.

B. Program development problem

Presently child day care is governed by Chapter 5104 of the Ohio Revised Code. Contained within this section are numerous rules and regulations which cover requirements to achieve a state license. While there is sufficient attention to physical facilities little attention is directed to program.

Recommendation.—The Task Force further recommends the enactment of standards which speak to program.

Rationale.—A variety of programs that enhance the developmental level of children should be available to meet differing child care needs. Children experiencing full-time child care clearly need different programs than children who are in child care situations only on an occasional or part-time basis.

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August 3, 1983

CONSTITUTIONAL LAW - EQUAL RIGHTS AMENDMENT - EQUAL PROTECTION - TAXING FOR "PUBLIC PURPOSE" - ASSESSMENTS AND TAXATION - COUNTRY CLUB PREFERENCE - "STATE ACTION" - STATUTES - SEVERABILIT PROPERTY TAX PREFERENCE FOR SINGLE-SEX COUNTRY CLUBS IS UNCONSTITUTIONAL.

The Honorable Stewart Bainum, Jr.
211 Senate Office Building
Annapolis, Maryland 21401

Dear Senator Bainum:

You have requested our opinion on the constitutionality of a portion of Article 81, §19(e) of the Maryland Code, which authorizes a preferential property tax assessment for country clubs under certain conditions. Your question particularly concerns those provisions of §19(e)(4) that impose a prohibition against sex discrimination by all country clubs receiving this preferential assessment, except those clubs "whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex".

In addressing your question, we have considered in detail the following specific issues:

1. Is there sufficient "state action" present in §19(e)(4) so that the State's Equal Rights Amendment (Article 46 of the Declaration of Rights) is violated by the exclusionary membership and guest policies of a single-sex country club that receives the property tax preference?

OPINION OF THE ATTORNEY GENERAL

Cite as: Opinion No. 83-031 (August 3, 1983) (to be published at 68 Opinions of the Attorney General ___ (1983))

2. Does authorization of a tax benefit for a single-sex country club violate the requirement of Article 15 of the Declaration of Rights that the State may tax and spend only for a "public purpose"?

3. Does §19(e)(4) violate Article 24 of the Declaration of Rights by invidiously or irrationally discriminating between two classes of country clubs - i.e., between (i) single-sex clubs, which are permitted to discriminate on the basis of sex, and (ii) all other clubs, which are prohibited from discriminating on the basis of sex?

The central issue is not whether a single-sex country club in Maryland may continue to close its doors to one sex. The issue is whether Maryland's country club tax preference scheme unconstitutionally involves the State in subsidizing sex discrimination.

For the reasons given below, we think that it does. It is our opinion that implementation of §19(e)(4) does involve "state action" and, as a consequence, the exclusionary practices of single-sex country clubs receiving tax benefits under §19(e) violate Article 46 of the Declaration of Rights, the Equal Rights Amendment. Although less certain, this authorization of a tax benefit for a single-sex country club might well also violate Articles 15 and 24 of the Declaration of Rights.

I

The Statute: Its History and Operation

A. Overview of Statute

The General Assembly enacted the country club tax preference - Article 81, §19(e) - as an emergency measure in 1965. See Chapter 399, Laws of Maryland 1965 (effective April 8, 1965). The Preamble to the 1965 Act declares:

> "[I]t [is] in the general public interest that [country club] uses should be encouraged in order to provide open spaces and provide recreational facilities and to prevent the forced conversion of such country clubs to more intensive or different uses as a result of economic pressures caused by the assessment of country club land and improvements at a rate or level incompatible with the practical use of such property for country clubs."

The mechanics of the tax preference have changed very little since 1965. The State Department of Assessments and Taxation is authorized to make "uniform agreements" with country clubs "relative to the assessment and taxation of lands actively devoted to use as a country club". §19(e)(1). The initial period to be covered by such an agreement is at the option of the club, but may not be less than 10 years. §19(e)(5). Should the State or the club desire to continue the arrangement, extensions may be agreed to for additional five-year increments. §19(e)(14). Without an extension, the agreement expires.

If a club enters into an agreement, its land is assessed for purposes of current property tax liability on the basis of its use as a country club and not "as if subdivided or used for any other purpose". §19(e)(2). At the same time, the property also is assessed on the basis of its highest and best use - i.e., as if subdivided or more intensely developed. §19(e)(3). However, taxes attributable to the greater assessment are deferred and do not become payable unless the property ceases to be used as a country club, is conveyed to a new owner unwilling to abide by the assessment, or fails to meet the statutory definition of "country club". §19(e)(7), (8), and (9). If any of these events occurs, a club will be liable for up to 10 years of deferred taxes. §19(e)(7).

An analysis of these provisions indicates that the §19(e) tax preference, quite unlike the typical tax exemption [cf. Kimball-Tyler v. Baltimore City, 214 Md. 86, 97 (1957)], constitutes a surrender of a portion of the State's taxing power and - under the Contract Clause of the United States Constitution, which prohibits the states from "impairing the obligation of contracts" - creates a contractual obligation that the State is not free to impair at will. See Opinion No. 79-074 (December 14, 1979) (unpublished).

B. The Discrimination Ban

When it was first enacted in 1965, §19(e) contained no ban against discrimination by any of the country clubs receiving the tax preference. Those restrictions were only added to §19(e)(4) 9 years later, by Chapter 870, Laws of Maryland 1974.

As introduced, the 1974 legislation would have absolutely prohibited all clubs that receive the tax preference from discriminating in membership or guest privileges on the basis of race, color, creed, national origin, or sex. To enforce this antidiscrimination requirement, the statute charges the Attorney General with determining whether a club is engaging in any prohibited discrimination. In connection with a discrimination investigation, the Attorney General is authorized to go to court for issuance of a subpoena for club records. Before the Attorney General may make a determination that a club has engaged in discriminatory practices, the Attorney General must afford a hearing to the club. If a "pattern of discrimination" is then determined to exist, the Attorney General must try to resolve the matter by consent agreement. If the club violates that consent agreement or refuses to enter into a consent agreement, the Attorney General must then issue a cease and desist order. Only if that cease and desist order has been violated is the club's preferential assessment placed in jeopardy: upon violation of the order, the tax advantage will be withdrawn until the Attorney General determines that the club is again in compliance with the law.

Before passage of the 1974 legislation, an amendment to the bill was adopted, adding the following exemption for single-sex clubs:

> "The provisions of this [sub]section with respect to discrimination in sex shall not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex...."

Thus, as finally enacted, the Attorney General was given somewhat anomalous duties. In most cases, the Attorney General is called upon to investigate and determine whether discrimination exists, so as to trigger the statute's antidiscrimination enforcement scheme. In the case of single-sex clubs, however, the converse is true: the Attorney General is called upon to investigate and determine whether discrimination exists to such a degree - i.e., whether the "primary purpose" of the club is to serve members of a particular sex - as to justify an outright exemption from this antidiscrimination enforcement scheme. In most cases, then, the Attorney General is required to investigate prohibited discriminatory practices, for the purpose of taking punitive action; in the case of single-sex country clubs, however, the Attorney General is asked to certify that the club's "primary purpose" is, in effect, a discriminatory one, for the purpose of authorizing a continued tax preference.

C. Prior Implementation of Exemption

In February of 1978, the then Attorney General reached just such a conclusion in an investigation of Burning Tree Country Club in Montgomery County. As a result of that investigation, he concluded that Burning Tree, a single-sex country club, "complied" with the statutory exemption. (To date, Burning Tree is the only single-sex country club in Maryland that has qualified for a tax preference under the exemption.)

His findings stressed that women were not allowed to enter or use clubhouse facilities - described by Burning Tree as being devoted solely to golf and "its attendant pastimes" - and that no other events, to which women might be expected to be invited, were ever held at the club. *See* Determination Letter from Jon F.

Oster, Deputy Attorney General, to M. Everett Parkinson, President of Burning Tree Country Club (February 15, 1978).[1] In concluding that this single-sex club "complied" with the statutory exemption, the former Attorney General adopted the club's position that "[t]he only way the club could be 'operated' to serve both sexes would be by building a substantial addition to the clubhouse which would have the effect of requiring major changes in the location of the first tee, the ninth tee and the eighteenth green". Id.

II

State Action under the Equal Rights Amendment

A. Introduction

Maryland's Equal Rights Amendment ("ERA") was adopted in 1972 as Article 46 of the Declaration of Rights. It provides that: "Equality of rights under the law shall not be abridged or denied because of sex." This Office has consistently viewed the words "under the law" as indicating that the constitutional prohibition applies only to (i) governmental entities and (ii) private organizations affected by "state action". See 68 Opinions of the Attorney General ___, ___ (1983) [Opinion No. 83-010 (March 7, 1983)]; 65 Opinions of the Attorney General 103, 103 (1980); 63 Opinions of the Attorney General 246, 250 (1978).

Clearly, a single-sex country club receiving a tax preference under §19(e) is not a governmental entity. However, we believe it to be equally clear that, under §19(e), such an entity is affected by "state action".[2]

B. Elements of State Action

There are probably as many approaches to defining "state action" as there are cases and litigants in this evolving area of constitutional law. For example, the courts of some states, in enforcing state constitutional provisions, have felt free to find "state action" more readily than the Supreme Court has done in treating cases arising under the Fourteenth Amendment to the United States Constitution. See, e.g., Sharrock v. Dell Buick-

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[1] An exception to this rule permitted wives to purchase Christmas gifts for their husbands from the club's pro shop.

[2] On at least two prior occasions, this Office reserved decision on whether state action would be found in the discrimination practices of a tax exempt private club. See 63 Opinions of the Attorney General 246 (1978); 56 Opinions of the Attorney General 468 (1971).

Cadillac, Inc., 45 N.Y.2d 152, 160 (1978).[3] Other courts have suggested that the test for finding "state action" may vary, depending on the circumstances: For example, a court might be more inclined to find state action in situations involving race or sex discrimination than in those involving some other constitutional violation. See, e.g., Writers Guild of America, West, Inc. v. FCC, 423 F.Supp. 1064, 1135-36 (C.D. Cal. 1976). Similarly, a court might be more likely to find state action in disputes where governmental agencies or officials have themselves been sued than in those where only private parties are involved. See, e.g., Naranjo v. Alverno College, 487 F.Supp. 635, 637 (E.D. Wis. 1980).

We need not here consider how a Maryland court might respond to suggestions that a more lenient test be applied to the ERA. In our view, even if the court were to apply the more recent, relatively stringent Fourteenth Amendment "state action" tests of the Supreme Court, it would find state action in §19(e)(4).

In a trio of cases decided in June of 1982, the Supreme Court attempted to clarify its past, often conflicting precedents on state action and to formulate a new set of rules to guide that judicial inquiry. See Lugar v. Edmondson Oil Co., Inc., 457 U.S. ____ [102 S.Ct. 2744] (1982); Rendell-Baker v. Kohn, 457 U.S. ____ [102 S.Ct. 2764] (1982); Blum v. Yaretsky, 457 U.S. ____ [102 S.Ct. 2777] (1982).

In Lugar v. Edmondson Oil, the majority opinion distilled the entire "state action" analysis into two distinct inquiries:

> 1. Whether the alleged constitutional deprivation was caused by the exercise of some right or privilege created by the state, by a rule of conduct imposed by the state, or by a person for whom the state is responsible; and
>
> 2. Whether the party charged with the deprivation is a person who may be fairly said to be a "state actor". Id. 457 U.S. at ____ [102 S.Ct. at 2754].

The first inquiry is relatively straightforward. The second inquiry, in contrast, is ordinarily the more difficult and complex one, because mere action by a private party pursuant to a statute is not, without "something more", sufficient to characterize that party as a "state actor". Id. 457 U.S. at ___ [102 S.Ct. at 2755].

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[3] Indeed, even in applying the Fourteenth Amendment, the leading Maryland case on "state action" similarly seems to be more willing to find state action than have the federal courts. Compare Statom v. Board of Commissioners, 233 Md. 57 (1963) (Furnishing free use of public school buildings to segregated boys' club violates the Fourteenth Amendment) with Golden v. Biscayne Bay Yacht Club, 530 F.2d 16 (5th Cir. 1976), cert. denied 429 U.S. 872 (1976) (Preferential city lease with discriminatory yacht club not sufficient "state action").

In its trio of "state action" cases, the Supreme Court clarified the tests for finding this "something more". For example, the Court held that a state financial subsidy to a private entity does not, of itself, make the decisions of that entity "state action". Rendell-Baker v. Kohn, 457 U.S. at ___ [102 S.Ct. at 2771]. Similarly, the Court said that mere state regulation of a private entity does not, of itself, supply the "something more" needed for "state action". Blum v. Yaretsky, 457 U.S. at ___ [102 S.Ct. at 2786].

However, the Court also said that any one of the following tests, standing alone, does give rise to "state action":

> 1. A state can be held responsible for a private decision when it has exercised "coercive power" or has provided such "significant encouragement", either overt or covert, that the choice must in law be deemed to be that of the state. Blum v. Yaretsky, 457 U.S. at ___ [102 S.Ct. at 2786].
>
> 2. State action can exist when a private party performs a "public function" that has traditionally been the exclusive prerogative of the state. Id. 457 U.S. at ___ [102 S.Ct. at 2789-90].
>
> 3. Extensive and detailed state regulation of a private entity can amount to state action if there is a sufficiently "close nexus" between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. Id. 457 U.S. at ___ [102 S.Ct. at 2786].
>
> 4. A "symbiotic relationship" between the state and a private entity can constitute state action when the state profits from the discriminatory conduct. Rendell-Baker v. Kohn, 457 U.S. at ___ [102 S.Ct. at 2772].[4]

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[4] The first three of these "tests" have been denominated, respectively, the "state compulsion" or "state encouragement" test, the "public function" test, and the "nexus" test. See Lugar v. Edmondson Oil, 457 U.S. at ___ [102 S.Ct. at 2755]. The fourth – the "symbiotic relationship" analysis – has been said to be one branch of the "nexus" test. Id. It is clear that only one of these tests need be satisfied for state action to be found. Id.

C. *Application*

In our view, each of the applicable inquiries and tests is satisfied when applied to §19(e)(4).

First, the source of the country club tax preference is state law. Moreover, it is state law that, while generally imposing a ban against sex discrimination for clubs receiving the preference, nevertheless exempts a club from that ban if the State, acting through the Attorney General, makes an affirmative determination that the club operates with the primary purpose of denying its facilities entirely to members of one sex. Thus, the "privilege" both to fully discriminate against members of one sex and, at the same time, to receive a substantial tax benefit[5] is "created by" state statute. And because this privilege is triggered by a finding that state authorities are required by law to make, a tax-supported club that discriminates against members of one sex becomes "a person for whom the State is responsible". *Lugar v. Edmondson Oil*, 457 U.S. at ___ [102 S.Ct. at 2754].

Second, although the State might not be "coercing" clubs into sex discrimination, it is certainly providing "significant encouragement" to that end. Clubs that are willing to close their facilities *entirely* to members of one sex receive both a tax advantage and freedom from governmental scrutiny of their membership and guest practices. In contrast, clubs not willing to make such a total commitment to sex discrimination are subject to the ban and, on violation of that ban, to loss of their tax advantage.

And this tax advantage is not a typical tax exemption involving "mere passive state involvement". *Cf. Walz v. Tax Commission of City of New York*, 397 U.S. 664, 691 (1970).[6] Under

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[5] For example, in 1981, the Burning Tree Country Club was given a preferential assessment that was based on a "country club use" value of $1,027,570 rather than on the property's "highest and best use" value of $11,467,500. Under a "highest and best use" valuation, Burning Tree would have been required to pay the State a tax of $156,008.92. As a result of the "country club use" valuation, however, it paid only $25,696.17 - a net tax savings, for but one year, of $130,312.75.

[6] We recognize, as we must, that the recent Supreme Court "state action" decisions - *e.g., Blum v. Yaretsky*, 457 U.S. ___ [102 S.Ct. 2777] (1982) - appear to undercut the vitality of older, lower court cases that have struck down or questioned as unconstitutional the grant of a tax exemption to racially discriminatory private or social clubs on the basis of a very limited "state action" inquiry. *See Pitts v. Dept. of Revenue, State of Wisconsin*, 333 F.Supp. 662 (E.D. Wis. 1971); *McGlotten v. Connally*, 338 F.Supp. 448 (D. D.C. 1972); *Falkenstein v. Dept. of Revenue, State of Oregon*, 350 F.Supp. 887 (D. Ore. 1972), *appeal dismissed for lack of jurisdiction*, 409 U.S. 1099 (1973); *Cornelius v. Benevolent Protective Order of Elks*, 382 F.Supp. 1182, 1187 (D. Conn. 1974); *Brunson*
(continued)

§19(e), a qualifying country club receives more than a mere tax advantage. It benefits from the State's constitutionally-enforceable obligation not to substantially and without justification impair its agreement to confer that tax advantage and, as such, it receives a surrender of a portion of the State's sovereign power to tax. *See* Opinion No. 79-074 (December 14, 1979) (unpublished). *Cf. Kimball-Tyler v. Baltimore City*, 214 Md. 86, 97 (1957). Even the General Assembly could not, without justification, abrogate such agreements. This is no ordinary tax break. It is the State putting its entire weight behind the purposes and policies of, and the terms and conditions set forth in, §19(e).

Third, as the Preamble to the 1965 Act makes clear, the country club tax preference seeks to impose a "public function" - namely, land use control - on the recipients of the tax preference. This function, which is akin to the zoning power, has traditionally and exclusively been associated with the powers and prerogatives of government.

Fourth, we think it obvious that a "close nexus" exists between the regulatory activities of the State and the sexually discriminatory practices of a single-sex country club. This is so because the single-sex country club can obtain its tax advantage *only* upon a *State* determination that it is in fact discriminating to the *fullest* extent possible. When a state statute that promotes a state program of open space preservation also provides a special exemption from a state tax on the very condition that certain discriminatory practices have been certified to by the state's attorney general, it is the State that is acting. That the statutory scheme commands the attorney general to identify and endorse discriminatory practices which the State constitution expressly forbids to the State itself - and that the state fisc is employed to underwrite these

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v. Rutherford Lodge No. 547, B. & P. O. of Elks, 319 A.2d 80 (N.J.Sup. Ct. 1974). *See also Opinion of the Attorney General for State Tax Commission, State of Idaho* (Feb. 13, 1973). *But see Eaton v. Grubbs*, 329 F.2d 710, 713 (4th Cir. 1964) (A tax exemption by itself may not impose upon the recipient the restrictions of the Fourteenth Amendment, but may attain significance when viewed in combination with other attendant state involvement.).

We do note, however, that in *Bob Jones University v. United States*, __ U.S. __, __ [103 S.Ct. 2017, 2032] n. 24 (1983), the Supreme Court did reserve for decision the issue of whether the denial of tax exempt status to racially discriminatory schools was required by the equal protection component of the Fifth Amendment. Because we find "state action" in so many other features of §19(e), we need not decide whether the conferral of a tax preference, by itself, to a sexually discriminatory private club constitutes "state action" under the ERA.

practices[7] - are ironies that only serve to highlight the State's pervasive participation in these practices.

Finally, as the former Attorney General's determination in the Burning Tree Country Club investigation indicates, §19(e)(4) fosters a "symbiotic relationship" between the single-sex club and the State. Maryland "profits" not only from the open space for which it bargained but, uniquely in the case of a single-sex club, it might well obtain its full share of that open space only because the club discriminates against one sex or another. As expressed in the 1978 Determination Letter to Burning Tree Country Club, "[t]he only way the club could be 'operated' to serve both sexes" would be by cutting into the club's open space.[8]

D. Conclusion

Under Maryland's Equal Rights Amendment, once state action is found to exist, no justification is sufficiently compelling to sanction sex discrimination. See Rand v. Rand, 280 Md. 508 (1977).[9]

On the basis of the various factors described above, we have no doubt that state action exists here: a single-sex country club receiving a tax preference under Article 81, §19(e) violates the ERA when it excludes the opposite sex as members and guests; and the State violates the ERA when, pursuant to that same state statute, it encourages, endorses, and benefits from such discrimination.[10]

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[7] See note 5 above.

[8] See text accompanying note 1 above.

[9] We have recognized an exception to the ERA where state classifications are premised on a characteristic unique to one sex. See, e.g., 65 Opinions of the Attorney General 108 (1980). See also Article 49B, §5(b), which exempts from the State Public Accommodations Law those facilities "which are uniquely private and personal in nature, designed to accommodate only a particular sex". We do not believe that golf and "its attendant pastimes" (see text accompanying note 1 above) fit that description.

[10] You have also asked whether §19(e)(4), as applied to the discriminatory practices of a single-sex country club, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Unlike the Maryland ERA, the Fourteenth Amendment will permit sex discrimination under certain circumstances. Cf. Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft registration). However, a party seeking to uphold a statute or practice classifying individuals on the basis of sex and challenged under the Fourteenth Amendment must carry the burden of showing an "exceedingly persuasive justification" for the classification. Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981) (quoting Personnel Administrator of Mass. v. Feeny, 442 U.S. 256, 273 (1979)). That burden is met only by showing that the classification (continued)

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How ERA Would Change Federal Laws

Proponents of the Equal Rights Amendment often argue, "We need ERA because 800 Federal laws discriminate on account of sex." This report examines those 800 laws and how ERA would change them. It reveals how our nation would be dramatically changed if ERA ever became part of the U.S. Constitution.

The source of the "800 laws" argument is a 230-page book entitled *Sex Bias in the U.S. Code: A Report of the U.S. Commission on Civil Rights* published in April 1977. The U.S. Commission on Civil Rights is a Federal agency established by Congress to investigate and study discrimination and make reports to Congress.

Sex Bias in the U.S. Code was actually written by Ruth Bader Ginsburg and Brenda Feigen-Fasteau (who were paid with tax funds under Contract No. CR3AK010). Ginsburg is one of the two most widely quoted pro-ERA lawyers. Her name appears as one of the feminist lawyers in most of the gender cases that have reached the Supreme Court in the last decade. At the time *Sex Bias* was written, she was a professor of law at Columbia Law School and used the assistance of 15 Columbia Law School students. In 1980, President Jimmy Carter appointed Ginsburg to the second highest court in our country, the U.S. Court of Appeals for the District of Columbia. Feigen-Fasteau was a director of the Women's Rights Project for the American Civil Liberties Union, and has appeared in TV network and other debates on ERA with Phyllis Schlafly.

Thus, *Sex Bias in the U.S. Code* is a good index to what ERA would do. It was written by the two top ERA activist female lawyers, it was published by the U.S. Commission on Civil Rights, and it was funded by the Federal Government during the Carter Administration.

Sex Bias in the U.S. Code was written and published in order to identify all the Federal laws that discriminate against women, and to recommend the specific changes demanded by the women's lib movement in order to eliminate "sex bias" and to conform to "the equality principle" of ERA. (p. 10) *Sex Bias in the U.S. Code* makes it clear that, if ERA were ever added to the Constitution, ERA would accomplish *all* these changes in one stroke. *Sex Bias in the U.S. Code* also makes it clear that ERA activists are trying to accomplish the same results by changing Federal statutes. The ERAers are constantly pressuring the President and Congress to eliminate all the laws that discriminate on account of sex.

Sex Bias in the U.S. Code is, therefore, a handbook to prove what the ERA will do and what the ERAers want. The book proves that the legal consequences of ERA and the social and political goals of the ERAers are radical, irrational, and unacceptable to Americans. *Sex Bias* convicts the ERAers out of their own mouths. In the view of the authors, *all* the proposed changes listed in *Sex Bias* are needed in order to achieve "the equality principle" of ERA.

An old adage warns, "Would that mine enemy had written a book." Well, the top ERA lawyers wrote one, and they've provided a powerful weapon against ERA. Here is a summary of the changes demanded by the book *Sex Bias in the U.S. Code*. All quotations below are directly from the book and are identified by page numbers.

ERA Changes in Employment

The box below shows what changes ERA will bring in employment.

That's right, NOTHING! *Sex Bias in the U.S. Code* proves that ERA will do absolutely nothing in employment! *Sex Bias in the U.S. Code* explodes all the phony arguments made by the ERAers about the job discrimination and "59¢."

Sex Bias tries to claim that two Federal laws discriminate on sex in employment — and both claims are completely false. *Sex Bias* falsely claims that there is a "sex-age differential in 41 U.S.C. #35 setting a minimum age of 16 for boys and 18 for girls employed by public contractors." (p. 217) The fact is that the age was equalized for boys and girls in 1968. *Sex Bias* falsely claims that women are prohibited from working in coal mines. (p. 217) The fact is that more than 3,000 women are coal miners today.

ERA Changes in the Military

1. Women must be drafted when men are drafted.

"Supporters of the equal rights principle firmly reject draft or combat exemption for women, as Congress did when it refused to qualify the Equal Rights Amendment by incorporating any military service exemption. The equal rights principle implies that women must be subject to the draft if men are, that military assignments must be made on the basis of individual capacity rather than sex." (p. 218)

"Equal rights and responsibilities for men and women implies that women must be subject to draft registration if men are. Congressional debate on the Equal Rights Amendment points clearly to an understanding of this effect on the Amendment." (p. 202)

2. Women must be assigned to military combat duty.

"Until the combat exclusion for women is eliminated, women who choose to pursue a career in the military will continue to be held back by restrictions unrelated to their individual abilities. Implementation of the equal rights principle requires a unitary system of appointment, assignment, promotion discharge, and retirement, a system that cannot be founded on a combat exclusion for women." (p. 26)

3. Affirmative action must be applied to equalize the number of men and women in the armed services.

"The need for affirmative action and for transition measures is particularly strong in the uniformed services." (p. 218)

4. We must recruit an equal number of women into the military academies.

"Because entrance to the academies enables a person to obtain the education necessary for officer status and advancement opportunities, the equal rights principle mandates equal access to the academies." (p. 27)

ERA Changes in the Family

1. The traditional family concept of husband as breadwinner and wife as homemaker must be eliminated.

"Congress and the President should direct their attention to the concept that pervades the Code: that the adult world is (and should be) divided into two classes — independent men, whose primary responsibility is to win bread for a family and dependent women, whose primary responsibility is to care for children and household. This concept must be eliminated from the code if it is to reflect the equality principle." (p. 206)

"It is a prime recommendation of this report that all legislation based on the breadwinning, husband — dependent, homemaking wife pattern be recast using precise functional description in lieu of gross gender classification." (p. 212)

"A scheme built upon the breadwinning husband [and] dependent homemaking wife concept inevitably treats the woman's efforts or aspirations in the economic sector as less important than the man's." (p. 209)

2. The Federal Government must provide comprehensive government child-care.

"The increasingly common two-earner family pattern should impel development of a comprehensive program of government-supported child care." (p. 214)

3. The right to determine the family residence must be taken away from the husband.

"Title 43 provisions on homestead rights of married couples are premised on the assumption that a husband is authorized to determine the family's residence. This 'husband's prerogative' is obsolete." (p. 214)

4. Homestead law must give twice as much benefit to a married couple who live separate and apart from each other as to a husband and wife who live together.

"Married couples who choose to live together would be able to enter upon only one tract at a time." (p. 175)

"Couples willing to live apart could make entry on two tracts." (p. 176)

5. No-fault divorce must be adopted nationally.

"Consideration should be given to revision of 38 U.S.C. #101 (3) to reflect the trend toward no-fault divorce." (p. 159)

"Retention of a fault concept in provisions referring to separation ... is questionable in light of the trend away from fault determinations in the dissolution of marriages." (pp. 214-215)

6. The government must provide "paternity" leave for childrearing as well as maternity leave.

"A provision of Title 20 (#904) authorizes 'maternity' leave. To the extent that leave is authorized for childrearing as distinguished from childbearing, fathers as well as mothers should be eligible." (p. 213)

"In government schools overseas, leave may be taken by a teacher for ... 'maternity' purposes. ... Both male and female teachers may wish to take 'parental' leave to care for their infant children, and there is no justification for limiting such leave to female teachers." (pp. 106-107)

7. The role of motherhood must be restricted to the very few months in which a woman is pregnant and nursing her baby. Mothers are not entitled to any special benefits or protections for motherhood responsibilities beyond that.

"The references are to 'maternal' health or welfare and 'mothers.' Those terms would be appropriately descriptive only if the programs involved were confined to care for pregnant women and lactating mothers." (p. 212)

8. The law must not assume that a woman takes her husband's name upon remarriage.

"38 U.S.C. #3020 prohibits delivery of benefit checks to 'widows' [of veterans] whom the postal employee believes to have remarried, 'unless the mail is addressed to such widow in the name she has acquired by her remarriage.' As written, the provision implies that women automatically acquire a new name upon remarriage, an implication inconsistent with current law and the equality principle." (p. 156)

ERA Changes in Moral Standards

1. The age of consent for sexual acts must be reduced to 12 years old.

"Eliminate the phrase 'carnal knowledge of any female, not his wife who has not attained the age of 16 years' and substitute a Federal, sex-neutral definition of the offense ...: A person is guilty of an offense if he engages in a sexual act with another person, not his spouse, and ... the other person is, in fact, less than 12 years old." (p. 102)

2. Bigamists must have special privileges that other felons don't have.

"This section restricts certain rights, including the right to vote or hold office, of bigamists, persons 'cohabiting with more than one woman,' and women cohabiting with a bigamist. Apart from the male/female differentials, the provision is of questionable constitutionality since it appears to encroach impermissibly upon private relationships." (pp. 195-196)

3. Prostitution must be legalized; it is not sufficient to change the law to sex-neutral language.

"Prostitution proscriptions are subject to several constitutional and policy objections. Prostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions." (p. 97)

"Retaining prostitution business as a crime in a criminal code is open to debate. Reliable studies indicate that prostitution is not a major factor in the spread of venereal disease, and that prostitution plays a small and declining role in organized crime operations." (p. 99)

"Current provisions dealing with statutory rape, rape, and prostitution are discriminatory on their face ... There is a growing national movement recommending unqualified decriminalization [of prostitution and the prostitution business] as sound policy, implementing equal rights and individual privacy principles." (pp. 215-216)

4. The Mann Act must be repealed; women should not be protected from "bad" men.

"The Mann Act ... prohibits the transportation of women and girls for prostitution, debauchery, or any other immoral purpose. This language, which is not confined to illegal acts but encompasses 'immoral' conduct as well, appears too broad and vague to the point where fair notice of the activity proscribed is hardly supplied ... The act poses the invasion of privacy issue in an acute form. The Mann Act also is offensive because of the image of women it perpetuates ... It was meant to protect from 'the villainous interstate and international traffic in women and girls,' those women and girls who, if given a fair chance, would, in all human probability, have been good wives and mothers and useful citizens ... As the courts consistently proclaimed, the act was meant to protect weak women from bad men." (pp. 98-9)

5. Rape laws must be rewritten in sex-neutral language.

"A sex neutral definition of rape ... should be added to Title 18 or Title 10 and referred to throughout for the definition of the offense." (p. 103)

"Current provisions dealing with statutory rape, rape, and prostitution are discriminatory on their face." (p. 215)

6. Prisons and reformatories must be sex-integrated.

"If the grand design of such institutions is to prepare inmates for return to the community as persons equipped to benefit from and contribute to civil society, then perpetuation of single-sex institutions should be rejected ... 18 U.S.C. #4082, ordering the Attorney General to commit convicted offenders to 'available suitable, and appropriate' institutions, is not sex discriminatory on its face. It should not be applied, as it now is, to permit consideration of a person's gender as a factor making a particular institution appropriate or suitable for that person." (p. 101)

"Change the name and eliminate the single sex character of the National Training School for Boys ... Change the name and eliminate the single sex character of the Federal Reformatory for Women as part of the larger reorganization of the Federal correctional system necessitated by the equal rights principle." (p. 103)

7. In the merchant marine, provisions for passenger accommodations must be sex-neutralized, and women may not have more bathrooms than men.

"46 U.S.C. #152 establishes different regulations for male and female occupancy of double berths, confines male passengers without wives to the 'forepart' of the vessel, and segregates unmarried females in a separate and closed compartment. 46 U.S.C. #153 requires provision of a bathroom for every 100 male passengers for their exclusive use and one for every 50 female passengers for the exclusive use of females and young children." (p. 190)

"46 U.S.C. #152 might be changed to allow double occupancy by two 'consenting adults.' ... Requirements for separate bathroom facilities stipulated in Section 153 should be retained but equalized so that the ratio of persons to facility is not sex-determined." (p. 192)

ERA Changes in Education

1. Single-sex schools and colleges, and single-sex school and college activities must be sex-integrated.

"The equal rights principle looks toward a world in which men and women function as full and equal partners, with artificial barriers removed and opportunity unaffected by a person's gender. Preparation for such a world requires elimination of sex separation in all public institutions where education and training occur." (p. 101)

2. All-boys' and all-girls' organizations must be sex-integrated because separate-but-equal organizations perpetuate stereotyped sex roles.

"Societies established by Congress to aid and educate young people on their way to adulthood should be geared toward a world in which equal opportunity for men and women is a fundamental principle. In some cases, separate clubs under one umbrella unit might be a suitable solution, at least for a transition period. In other cases, the educational purpose would be served best by immediately extending membership to both sexes in a single organization." (pp. 219-220)

3. Fraternities and sororities must be sex-integrated.

"Replace college fraternity and sorority chapters with 'social societies.'" (p. 169)

4. The Boy Scouts, the Girl Scouts, and other congressionally-chartered youth organizations, must change their names and their purposes and become sex-integrated.

"Six organizations, which restrict membership to one sex, furnish educational, financial, social and other assistance to their young members. These include the Boy Scouts (36 U.S.C. ##21-29), the Girl Scouts (36 U.S.C. ##31-34, 36, 39), Future Farmers of America ..., Boys' Clubs of America ..., Big Brothers of America ..., and the Naval Sea Cadets Corp ... The Boy Scouts and Girl Scouts, while ostensibly providing 'separate but equal' benefits to both sexes, perpetuate stereotyped sex roles to the extent that they carry out congressionally-mandated purposes. 36 U.S.C. #23 defines the purpose of the Boy Scouts as the promotion of '...the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues. ...' The purpose of the Girl Scouts, on the other hand, is '...to promote the qualities of truth, loyalty, helpfulness, friendliness, courtesy, purity, kindness, obedience, cheerfulness, thriftiness, and kindred virtues among girls, as a preparation for their responsibilities in the home and for service to the community....' (36 U.S.C. #33.)" (pp. 145-146)

"Organizations that bestow material benefits on their members should consider a name change to reflect extension of membership to both sexes ... [and] should be revised to conform to these changes. Congress should refuse to create such sex-segregated organizations in the future … Review of the purposes and activities of all these clubs should be undertaken to determine whether they perpetuate sex-role stereotypes." (pp. 147-148)

5. The 4-H Boys and Girls Clubs must be sex-integrated into 4-H Youth Clubs.

"Change in the proper name '4-H Boys and Girls Clubs' should reflect consolidation of the clubs to eliminate sex segregation, e.g., '4-H-Youth Clubs.'" (p. 138)

6. Men and women should be required to salute the flag in the same way.

"Differences [between men a[illegible] the authorized method of saluting the flag shou[illegible]ed in 36 U.S.C. #177." (p. 148)

ERA Changes in So[illegible]rity

The Social Security section in *Sex* [illegible] *the U.S. Code* is hopelessly out of date. It has been obsoleted by Supreme Court decisions and statutory changes by Congress. There is no sex discrimination in Social Security today. The working woman receives the same benefit as the working man. The dependent-husband receives the same benefit as the dependent-wife. ERA should have no effect on Social Security.

ERA Changes in Language

1. The overwhelming majority of the 800 Federal laws that allegedly "discriminate" on account of sex merely involve the use of so-called "sexist" words which the ERAers are trying to censor out of the English language. About 750 out of the 800 changes in Federal laws demanded by the ERAers are ridiculous semantic changes. Here is a partial list of the specific words which *Sex Bias in the U.S. Code* wants censored out of the Federal laws. "The following is a list of specific recommended word changes." (pp. 15-16, 52-53)

Words To Be Removed	**Words To Be Substituted**
manmade	artificial
man, woman	person, human
mankind	humanity
manpower	human resources
husband, wife	spouse
mother, father	parent
sister, brother	sibling
entryman	enterer
serviceman	servicemember
midshipman	midshipperson
longshoremen	stevedores
chairman	chairperson, the chair
postmaster	postoffice director
plainclothesman	plainsclothesperson
watchman	watchperson
lineman	line installer, line maintainer
newsboy	newscarrier
businessman	businessperson
salesman	salesperson
duties of seamanship	nautical or seafaring duties
"to man" (a vessel)	to staff
she, her (reference to ship)	it, its
he or she	he/she
her or him	her/him
hers or his	hers/his

2. In another piece of nonsense, *Sex Bias* demands that Congress create a female anti-litter symbol to match "Johnny Horizon."

> "A further unwarranted male reference … regulates use of the 'Johnny Horizon' anti-litter symbol … This sex stereotype of the outdoorsperson and protector of the environment should be supplemented with a female figure promoting the same values. The two figures should be depicted as persons of equal strength of character, displaying equal familiarity and concern with the terrain of our country." (p. 100)

3. On the other hand, *Sex Bias* shows its hypocrisy by demanding that the "Women's Bureau" in the U.S. Department of Labor be continued. Although the authors admit that this is "inappropriate," (it is obviously sex discriminatory), they simply demand it anyway.

> "The Women's Bureau is … a necessary and proper office for service during a transition period until the equal rights principle is realized." (p. 221)

What *Sex Bias* Proves

A fundamental error in *Sex Bias* is its statement that "The Constitution, which provides the framework for the American legal system, was drafted using the generic term 'man.'" (p. 2) The authors apparently didn't bother to read the U.S. Constitution. If they had, they would have found that the word "man" does not appear in it (except in a no-longer-operative section of the 14th Amendment, which is not in effect now and was not in effect when the Constitution was "drafted"). The U.S. Constitution is the most beautiful sex-neutral document. It exclusively uses sex-neutral words such as person, citizen, resident, inhabitant, President, Vice-President, Senator, Representative, elector, Ambassador, and minister, so that women enjoy every constitutional right that men enjoy — and always have.

Out of the "800 laws" that allegedly discriminate on account of sex, a half dozen changes might be worth making. *Sex Bias'* most constructive proposal is to extend Secret Service protection to the widower of a future female President just like the protection now given to the widows of our male Presidents. (p. 99) But for that, we hardly need a constitutional amendment or a radical revision of Federal laws!

Sex Bias in the U.S. Code is devastating to the ERA cause. It proves that the "equality principle" of the Equal Rights Amendment will bring about more extremist results than anyone has yet imagined. *Sex Bias* proves that ERA is extremist in its anti-family objectives and extremist in its trivial nonsense. *Sex Bias* proves that ERA is extremist in its assault on our moral standards and extremist in its attack on the combat-effectiveness of our armed services.

Above all, *Sex Bias* proves how the leading lawyers of the ERA movement intend to use the "equality principle" of ERA to bring about vast changes in our legal, political, social, and educational structures — and that they are working hard with our tax dollars to do it *either* by constitutional mandate *or* by legislative changes *or* by judicial activism.

Finally, *Sex Bias in the U.S. Code* proves conclusively that (a) there are NO laws that discriminate *against* women, and that (b) all claims that ERA will help women in regard to jobs or employment are false and fraudulent.

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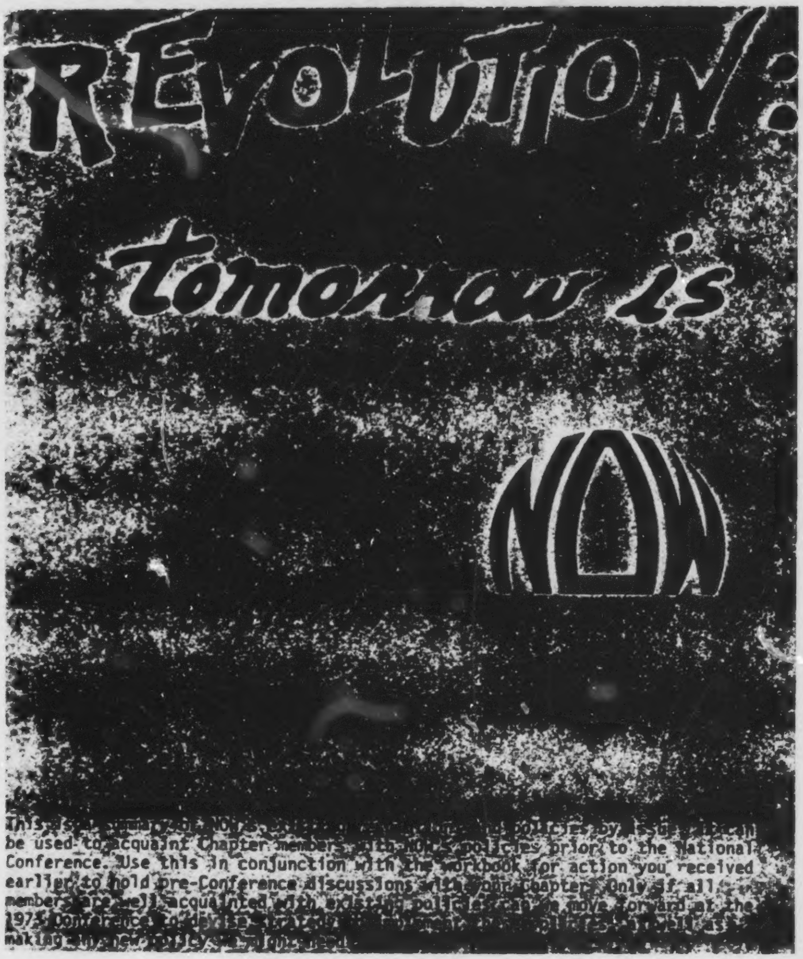

This is a summary of NOW's [illegible] and policies by issue. It can be used to acquaint Chapter members with NOW's policies prior to the National Conference. Use this in conjunction with the workbook for action you received earlier to hold pre-Conference discussions with your Chapter. Only if all members are well acquainted with existing policies can we move forward at the 1975 Conference to devise strategy [illegible] policies as well as making any new policy as [illegible].

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IX RELIGION

A. Religion Resolutions

1. Discrimination on the basis of sex is contrary to assumptions of Church teaching and laws, and that it is in the very best interests of humanity to oppose religious teaching and laws which impose such discrimination. (Nov., 1967)
2. Because the wearing of a head covering by women at religious services is a symbol of subjection within many churches. NOW recommends that all chapters undertake an effort to have all women participate in a "national unveiling" by sending their headcoverings to the task force chairman. At the Spring meeting of the task force of women and religion, these veils will be publicly burned to protest the second class status of women in all churches. (Dec., 1968)
3. Since church bodies have contributed to the development of concepts which encourage discrimination against women and have faithfully reflected these ideas in their own practices, and since the National Council of Churches represents such a large coalition of churches, we urge the NCC to:
    a. Challenge and assist church bodies to rethink and restate theological concepts which contribute to a false view of women.
    b. Give stronger leadership to efforts to eliminate discrimination against women in society and in the life of the church.
    c. Take the lead in uniting women of all denominations and religious groups to work together to support efforts to recognize the right of women to be ordained in religious bodies where that right is still denied.
    d. Place the issue of discrimination against women and its relationship to the work of the NCC on the agenda of its general board, its divisions and their departments.
    e. Develop personnel policies and practices that will achieve a more adequate representation of women at all levels of the executive staff of the National Council of Churches and its affiliated churches.
    f. Ensure that women are included in significant numbers among the planners, leaders, speakers and participants in all NCC-sponsored conferences. (Mar., 1970)
4. We decry the outdated, blatant discrimination displayed by the Roman Catholic Church recently in refusing to accept the credentials of the woman appointed to represent the West German government at the Vatican. (Mar., 1970)

5. In light of the enslavement of body and mind which the church historically has imposed on women, we demand that the seminaries:
    a. immediately stop and repudiate their propagation of sexist, male supremacist doctrine,
    b. initiate women's studies courses which cut through the traditional male, religious mythology to expose church and other social forces denying women their basic human dignity,
    c. actively recruit, employ and justly promote women theologians and other staff in all departments,
    d. actively recruit, enroll, financially aid and seek equal placement for women theological students. (Mar., 1970)
6. We demand that the churches desexigrate help-wanted ads in their own publications.
7. We demand that Title VII of the 1964 Civil Rights Act be amended so that religious groups no longer have legal sanction to discriminate on the basis of sex. (Mar., 1970)
8. NOW will challenge the tax exempt status of the Catholic Church since it is lobbying against abortion law repeal. (Apr., 1971)

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THE CATHOLIC LAWYER

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In this Issue:
THE ERA AND CHURCH LAW
LEGAL EDUCATION

ST. JOHN'S UNIVERSITY
NEW YORK

THE ERA IN DEBATE — WHAT CAN IT MEAN FOR CHURCH LAW?

REV. MSGR. ANTHONY J. BEVILACQUA, J.C.D., M.A., J.D.*

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X. ROMAN CATHOLIC CHURCH LEGISLATION AND MINISTRY AND THE ERA

In discussing the impact of the ERA on Church legislation and ministry, two major issues should be considered:

1. What effect would the passage of the ERA have upon the policy and activities of the Catholic Church?
2. What would be the effect of the Amendment on the Church's

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policy of excluding women from the priesthood?

The passage of the ERA may raise important questions for the Catholic Church in its religious activity, its self-government and its non-ecclesiastical but related activities. Today, the Establishment Clause of the first amendment compels government to "stay out of the church's religious activities, its internal government, and the operations of the church hierarchy." With the passage of the ERA, the historical tradition and case law interpretation of disputes involving church law, wherein the federal courts have repeatedly warned state legislatures and state courts to refrain from interference, will not change. This nonintervention will apply even where church activities exclude women, so long as the exclusive activity is religious in nature. Nevertheless, there may be changes in areas such as education, where single sex institutions supported by the church could be forced to convert to coeducation or lose government funding.

The first amendment language that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"[141] historically has stood for strict prohibition of governmental interference in ecclesiastical matters. It is firmly established that the first amendment severely restricts the courts in deciding religious disputes, "even if such controversies affect civil rights."[142] As the Supreme Court wrote in a 1947 decision: "We could not approve the slightest breach."[143]

In this highly sensitive area "only the gravest abuses endangering paramount interests" give occasion for permissible limitation via the state's police power. As an example, acceptable religious practice was held an insufficient justification to exempt Mormons from prosecution under the laws prohibiting polygamy.[144] The Court noted that it was not attempting to impose its views on the religious practices of Mormons, but rather that it was the state's paramount interest in marriage, a civil institution, that necessitated regulation.[145] Where public safety was involved, the Court of Appeals of Kentucky upheld the state's restrictions on certain harmful activities even though they were part of the religious service. This limited intervention was viewed only as affecting the freedom to act, and not the freedom to believe.[146]

In the most recent Supreme Court case, the Court held that there must be a balancing between the state's legitimate interest in universal education and other fundamental rights and interests specifically protected by the Free Exercise Clause of the first amendment.[147] The parents of Amish school children challenged the state's authority to require education beyond the eighth grade as contrary to Amish religion and way of life. The Court acknowledged the state's traditional and accepted interest in universal formal education, but stated that even this paramount interest is not totally free from a balancing approach where it impinges on fundamental religious beliefs protected by the first amendment. The Court noted that the interests of the individuals had to be religiously grounded to be entitled to constitutional protection: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[178] The record established at trial was held to support the claim that the traditional life-style of the Amish was not "merely a matter of personal preference, but one of deep religious conviction"[179] and therefore, it was incumbent upon the state to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish. In the absence of such proof, the Amish children were permitted to terminate their public education after the eighth grade.[180]

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[141] U.S. CONST. amend. I.

[142] *See* Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Abuhoff, *Title VII and the Appointment of Women Clergy: A Statutory and Constitutional Quagmire*, 13 COLUM. J.L. SOC. PROB. 257, 267 (1977).

[143] Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[144] Reynolds v. United States, 98 U.S. 145 (1878).

[145] *Id.* at 164-65.

[146] *See* Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942).

[147] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

Matters of church government and internal administration historically have been placed beyond the jurisdiction of the civil authorities.[181] There are no instances where government has regulated the religious doctrine of any group, nor has government intervened where church tribunals have determined disputes in accordance with that church's own procedures for self-governance. Property disputes which arose incidental to controversies between rival churches seeking recognition by the official church hierarchy were held to be non-reviewable by civil courts. Where the real issue was "which church was the recognized one, and therefore entitled to the property", the civil courts upheld the church action and would not become involved. In *Watson v. Jones*,[182] two factions struggled for control of church property, and one had been recognized by the highest ecclesiastical body of the Presbyterian Church as the "regular and lawful" governing body of that church. The court ruled that civil courts were bound by the ecclesiastical ruling:

> whenever the questions of discipline, or of faith or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.[183]

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[178] *Id.* at 215.

[179] *Id.* at 216.

[180] *Id.* at 218.

[181] *See* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

[182] 80 U.S. (13 Wall.) 679 (1871).

[183] *Id.* at 727.

Similarly, in a dispute involving the property of the Russian Orthodox Church in New York, the Supreme Court held that "legislation that regulates church administration, the operation of the churches or the appointment of clergy . . . prohibits the free exercise of religion."[104]

In the same decision, the Supreme Court commented on previous decisions relating to noninterference of the state in church matters by noting that throughout these opinions there exists "a spirit of freedom for religious organizations, an independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[105]

An obvious question arising from the ERA will be the role of women in the church. Will the state interfere with church policy regarding admission of women to the priesthood or to certain ecclesiastical offices or in performance of ceremonial rituals? The answer is "no." In cases already decided, the constitutional prohibition against civil interference with church doctrine and governance has been extended to the selection of the church ministry. In instances concerning dismissal from a ministry, removal from a particular pulpit, and a refusal of appointment to a chaplaincy based on Canon Law, courts invariably have held that no jurisdiction existed for civil court review of ecclesiastical action.

In a 1929 case, *Gonzalez v. Roman Catholic Archbishop,*[106] the petitioner, a Roman Catholic priest, brought an action to compel the Archbishop to appoint him to a chaplaincy. The Archbishop refused to appoint him on the ground that according to the canons of the new Code of Canon Law he did not then have the qualifications required for the chaplaincy. In upholding the decision of the Archbishop, the Supreme Court said:

> Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion, or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.[107]

In the later case of *Kedroff v. St. Nicholas Cathedral,*[108] the Supreme Court stated: "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference."[159] The Court explained in a footnote that the "improper methods" meant the "fraud; collusion, or arbitrariness" exceptions in *Gonzalez.*[160] It can be safely concluded that, except for the limited circumstances given above, "the *Kedroff* opinion . . . grants religious organizations absolute freedom to select their clergy."[161]

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[104] *See* Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 107 (1952). The Supreme Court subsequently applied its *Kedroff* rationale in Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

[105] 344 U.S. 94, 116 (1952).

[106] 280 U.S. 1 (1929).

[107] *Id.* at 16. In Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), the Supreme Court held that the "arbitrariness" exception in *Gonzalez* was inconsistent with the first amendment mandate that the courts accept the decisions of the highest ecclesiastical tribunal on matters of doctrine and church government.

[108] 344 U.S. 94 (1952).

In more recent cases, decided after the civil rights legislation and the landmark Supreme Court decisions of the 1960's, the courts continued to strike down state interference in clergy selection. The fifth circuit, for example, upheld a church's decision to oust its pastor, despite the pastor's claim that his civil rights were denied and that he was dismissed because of his views on race and the color of his wife's skin.[162] The court stated that the fundamental question of who will preach from the pulpit of a church and who will occupy the parsonage is to be answered by the church and not a civil court: "[That] determination . . . is at the very heart of the free exercise of religion, which plaintiffs would corrode with an overlay of civil rights legislation and other parts of the Constitution. The people of the United States conveyed no power to Congress to vest its courts with jurisdiction to settle purely ecclesiastical disputes."[163] In view of the church's exclusive power over such questions, the court dismissed the plaintiff's claim that his own right to the free exercise of his religious beliefs was denied by the church's action, stating that he was not prevented from worshiping, but merely precluded from preaching to them. Though he might have a breach of contract action under state law, as any other employee of a church, the court stated, he has no right under the Free Speech Clause of the first amendment to be paid for preaching to a congregation that did not want to hear him. Moreover, if he was dismissed according to procedures established by the church, his remedy was to follow church procedure and appeal to the superior church authorities.

Similarly, legal precedent requires courts to refrain from interfering with church actions where a sex discrimination charge was brought under present federal law. In a Title VII (discrimination in employment) action, plaintiff McClure, a Salvation Army ordained minister, alleged that she received a lower salary and fewer fringe benefits than male ministers holding the same rank and responsibilities. The court refused to review dismissal of her claim on the grounds that Title VII did not cover the employment relationship between a church and its ministers, and that reading of Title VII to cover McClure's employment as a minister (other employees of the church in nonreligious work might be covered) would bring the statute into direct conflict with the first amendment: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern."[181]

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[159] *Id.* at 116.

[160] *Id.* at 116 n.23 (quoting Gonzales v. Roman Catholic Archbishop, 280 U.S. 1, 16-17 (1929)).

[161] Abuhoff, *supra* note 142, at 274.

[162] Simpson v. Wells Lamont Corp., 494 F.2d 490 (5th Cir. 1974).

[163] *Id.* at 492.

Considering the facts in *McClure v. Salvation Army*, discussed above, and the court's unwillingness to intervene in the dispute, it is unlikely that any court would consider an action brought by women for admission to the Catholic priesthood. The Salvation Army allowed women into the ministry. Thus, a decision in *McClure* compelling equal treatment of both men and women holding similar positions in the church would not have touched upon the basic teachings of the church. In other words, the court could have held that the petitioner in *McClure* was arbitrarily denied these benefits, and the Salvation Army would have had no first amendment "freedom of exercise" claim since church doctrine and belief were not in issue. Because the *McClure* court did not rule that such a discriminatory practice was invalid even where it was not predicated on church dogma, a fortiori the courts would not invalidate sex-based discrimination in internal church administration where such action is predicated on and directly concerns a specific tenet of Catholic teaching.

In the Catholic Church, women are not permitted to become priests or to hold specified executive or decision-making posts in the Vatican. The Catholic Church's position has not waivered even after the ministries of other churches have begun admitting women. The Vatican statement asserted that female priesthood is inconsistent with the fact that Christ was a man. For the celebrant of the Mass to successfully express Christ's role in the Eucharist, he must physically resemble Christ. Moreover, the exclusion of women from the priesthood is not only a traditional practice based on church history, but is held to be an important component of the Catholic Church's teaching.

There should be no apprehension that the ERA would cause judicial intervention in religious practices. Where such practices directly contradicted constitutional doctrine, there is already precedent for nonintervention. For example, until this past year, the Mormon Church welcomed blacks as members but did not admit them to the ministry. There is no instance of government intervention to change that policy.

The Catholic Church is involved in many activities beyond its primary religious one. It operates schools, hospitals and other social service institutions. It is the recipient of large amounts of government subsidies for these activities, and it receives a tax exemption on all property that it owns and on income it receives, as do other nonprofit religious, charitable, and cultural organizations. It is perhaps in these "support" activities where the ERA may have an impact on the church.

There is one reported instance where a church-run institution was denied government funds because its policies were "unconstitutional." In

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[181] McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972).

Bob Jones University v. Johnson,[165] plaintiff, a Fundamentalist school in South Carolina, taught that the Bible forbids the intermarriage of the races. It therefore denied admission to unmarried nonwhites. The courts upheld the position of the Federal Veterans Administration, which refused to grant Veterans Benefits to students attending Bob Jones. This is a lower court decision and, although affirmed by the circuit court,[166] is the only decision of its kind. Moreover, as an example of the possible difficulty for the Catholic Church, it is readily distinguishable in that women are welcome to join the Catholic Church. The exclusion of women is from the ministry, not from membership. A closer analogy may be drawn from the experience of the Mormon Church which welcomes blacks as members, but until this past year did not accept them into the ministry. Unlike Fundamentalist institutions, Mormon churches and schools continue to enjoy their tax exemption and to receive government benefits that were granted to other church schools. If the fifth amendment did not affect Mormon churches by reason of their position on blacks serving as clergymen, the ERA will not affect the Catholic Church by reason of its position on women clergy.

The Catholic Church, although organized for religious and not commercial purposes, would nevertheless be considered an "employer" engaged in an industry affecting commerce. On this basis, it would be subject to legislation relating to social interests and policies. "Organizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes."[167]

One of the leading scholars in favor of the ERA, Professor Ruth Bader Ginsburg of Columbia Law School, expressed her assurances that the Amendment would not conflict with church doctrine and practices, especially in relation to restrictions on women entering the ordained ministry. Asked whether ratification of the ERA would affect the tax-exempt status of churches and church schools if they continued to prohibit women from becoming ministers, Professor Ginsburg responded: "A high wall of separation between church and state is basic to our system. It appears virtually certain that, in the event of a challenge, courts would construe ERA in a manner that avoids collision with religious doctrine and practice relating to the ministry."[168]

It is reasonable to predict that the ERA will have no direct effect on Catholic religious belief, church legislation on the ministry, internal church administration or other policies based on tenets of religious belief. The Amendment may have an indirect effect on policies and activities of church-administered institutions (schcols, hospitals, social service agencies). It is likely, however, that such an effect would be manifested mainly by the denial of government aid programs to such religious institutions. That is, while the ERA would not dictate a change in the programs or practices of any of these agencies, it may result in the denial of federal funding to them. Given the existing precedent, however, it is unlikely that the Amendment would have any effect on tax exemption, curriculum or selection of clientele. As admission to the priesthood and other ecclesiastical offices restricted to clerics is determined by criteria predicated on religious beliefs, it would be unaffected by the ERA.

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[165] 396 F. Supp. 597 (D.S.C. 1974).

[166] 529 F.2d 514 (4th Cir. 1975).

[167] McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir. 1972).

[168] Letter from Professor Ruth Bader Ginsburg to Barbara Burton of the League of Women Voters (June 10, 1975).

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THE EQUAL RIGHTS AMENDMENT: MYTHS AND REALITIES

BY SENATOR ORRIN G. HATCH

14

Miscellaneous Laws

The language of the ERA is sufficiently vague to permit a creative court or legislature to view within its terms almost any law or public policy. There are no apparent limits that can usefully be applied by the courts.

A few miscellaneous laws that may run into constitutional hurdles upon passage of the ERA would include the following:

Social Security—Some feminists have waged efforts to treat home-makers (who tend to be women) as equivalent to business "employees" for Social Security purposes.[137] As the U.S. Civil Rights Commission has observed,

> Full-time homemakers have never been accorded any independent social security coverage. . . the ERA will provide a constitutional basis for urging recognition of this contribution.[138]

Legislation recommended in 1977 by the Commission on International Women's Year would have treated the home-maker as either a "self-employed worker" (and subject her to Social Security taxes), or as an "employee" of her husband (and subject both her and her husband to Social Security taxes). As a subsequent Presidential Report described the proposal, it would have had the Federal government establish a "specific dollar value for work performed in the home. . . and required home-makers to pay Social Security taxes on the imputed value of their services."[139] Financial columnist, Sylvia Porter, in commenting upon the "Home-Maker's Tax" has stated,

> If some change along these lines is not enacted sooner by Congress, the Equal Rights Amendment when finally passed will require it.[140]

Insurance—Many proponents of the ERA are concerned that insurance companies are able to take an individual's sex into account in preparing actuarial tables and establishing insurance rates. They have proposed legislation that would prohibit insurance companies from doing either.[141] Under current law, because women tend to be safer drivers than men (particularly young women compared to young men), they tend to pay less for automobile insurance. Similarly, under current law, because women tend to live longer than men, they tend to pay slightly more for equivalent annuity policies. Any new law that established "unisex" insurance rates would require insurance companies to radically overhaul the way they conduct business and establish rates, not on a sound and prudent economic basis, but on the basis of prevailing political trends. Instead of individuals paying rates based upon reasonable costs to the insurance company, insurance rates would tend to result in politically weak groups perpetually subsidizing other politically strong groups.[142] Over the long run, everyone would tend to pay more for their insurance.

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[137] See, *e.g.*, H.R. 3010, 94th Congress (1975).

[138] Civil Rights Commission (1981) at 15.

[139] U.S. Department of Health, Education, and Welfare, Social Security and the Changing Roles of Men and Women (February, 1979) at 105.

[140] April 9, 1975 syndicated column. See also California Commission on the Status of Women, Impact of the ERA: Limitations and Possibilities (1975) at 202.

The Civil Rights Commission states flatly that the ERA will "prohibit sex-based discrimination in insurance wherever governmental action is involved."[143] As one of the most heavily regulated industries in the country, this would likely ensure a radical restructuring of insurance practices throughout the country.

Child Care—Some have argued that the Equal Rights Amendment would require the States and the Federal government to make adequate provisions for public day care facilities to ensure that women have a fully equal ability to enter the work force while leaving their children attended. Judge Ruth Bader Ginsburg, long an ardent advocate of the ERA, has said in this regard,

> The increasingly common two-earner family should impel development of a comprehensive program of government-supported child care. . . in order to achieve the "equality principle" of the ERA.[144]

An Ohio State Task Force on the implementation of the ERA, argued similarly that the ERA would require a "consideration of a new public policy on the issue of child care" and that, in its view, "quality child care must be made available to all families who need such services irrespective of their income level".[145]

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[141] See, *e.g.*, "The Fair Insurance Practices Act", S. 372 and H.R. 100 (98th Congress); Senate Report No. 97–671 (1982). See also *In re Mattis v. Hartford Accident & Indemnity Co.* Docket #R78–7–2 (April 17, 1980, Pennsylvania); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Committee v. Norris* (Docket No. 82–52, July 6, 1983). The preoccupation of the feminist community with "individualized" treatment in the area of insurance policy is at sharp contrast with their attitudes on affirmative action", see *supra* at 45.

[142] See, *e.g.*, testimony of the American Academy of Actuaries; Barbara J. Lautenheiser, senior Vice-President, Phoenix Mutual Life Insurance Company on S. 2204, The Fair Insurance Practices Act before the Senate Committee on Commerce, Science, and Transportation, July 15, 1982; See also Fortune, April 14, 1983 at 104.

[143] Civil Rights Commission (June 1981) at 17. See also American Association of University Women, At Ease with the ERA (1980) at 49; Brown & Freedman Sex Averaging and the Equal Rights Amendment, 1975 Women's Rights Law Rep. 35.

[144] Sex Bias in the U.S. Code at 214 (authored by Judge Ginsburg).

[145] Ohio Task Force Report for the Implementation of the Equal Rights Amendment (1975) at 17–20.

Research Funds—Congresswoman Patricia Schroeder, a proponent of the ERA, has suggested that the amendment would lead to a legal "right" in women to "claim an equal portion of research money for diseases that women are concerned about as men do. . . ."[146] This novel theory would seem to suggest a constitutional claim under the ERA that Congress set aside 50% of all health research and development funds for "women's diseases" and 50% for "men's diseases".

Prison Sentences—The Citizen's Advisory Council on the Status of Women, a Presidential body, has argued that "Only the Equal Rights Amendment will promptly end criminal sentence discrimination because of sex."[147] What they are referring to is not the fact that some laws impose greater sentences upon women than men (there are no such laws of which I am aware). Rather, they seem concerned that individual women are occasionally sentenced to longer prison terms than individual men. This is true, but only in the sense that individual sentences are always based upon a variety of considerations by the court: whether an individual is a repeat offender, whether they show remorse, the extent of injuries caused to a victim, age, and so forth. It is rare that two individuals are given precisely the same term for committing the identical criminal offense. Apparently, the Advisory Council believes that the ERA will lead to a constitutional right in women to have their sentences reviewed or overturned if they exceed some national standard. Doubtless, any evidence demonstrating that men and women, on average, did not serve prison sentences of precisely the same length would constitute evidence of unconstitutional sex discrimination (although it is likely that such evidence would demonstrate men, not women, to be the "victims".)

Veterans Benefits—Feminists have already challenged (unsuccessfully) State laws which accord military veterans some preference in applications for civil service jobs.[148] Some women's groups have argued that such laws are unconstitutional because a disproportionate number of veterans are men. Under the ERA, such veteran's 'preference' laws would almost certainly be ruled unconstitutional. Other forms of veteran's benefits might be subject to attack on similar grounds.

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[146] National Town Meeting of the Air, June 29, 1978. See also generally the statement of Nancy F. Russo, Administrative Officer for Women's Programs, American Psychological Association, and Elaine Hilberman, Chairperson, Committee on Women, American Psychiatric Association, Letter to U.S. Senators on mental health and Equal Rights Amendment, June 8, 1978 ("Women are over-represented among the mentally ill."); *Wall St. Journal*, June 24, 1983, at 1 (describing medical policy of supplying expensive growth hormones to boys until they reach the height of 5'6" and to girls only until they reach 5'4".)

[147] Citizen's Advisory Council on the Status of Women, U.S. Department of Labor, Item No. 24–N (February 1972).

[148] *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). See also Brown at 17; *cf* California Commission at 122 ("An alternative would be to extend veteran's preference to a veteran *and* his or her spouse.")

Sex Harassment—In order to ensure truly equal employment opportunities for women, it is likely that ratification of the Equal Rights Amendment will bring with it new federal rules and regulations relating to sex harassment by employers and supervisors. While the Equal Opportunity Employment Commission has already moved tentatively into this area, the ERA will likely "constitutionalize" this policy and establish federal courts as fact-finders and overseers of allegations of intra-office sex harassment.[149]

What is Sex Discrimination??

All of the following issues have been raised as illustrations of "sex discrimination":

(1) Differing legal requirements for men and women on proper protocol for saluting the United States flag.

(2) Weight requirements for high school majorettes.

(3) Political party requirements that each State be represented by a single committeeman and a single committeewoman.

(4) Denial of parental leave-time for both men and women following childbirth.

(5) Separate athletic competitions in the Olympic games for men and women.

(6) All male or all female high school or college choirs

(7) School sponsored functions which limit attendance to fathers/sons or mothers/daughters.

(8) The presumption that married women take their husband's surname.

(9) Textbooks in schools which show women in "stereotyped" roles and which fail to show them performing "non-traditional" jobs and functions.

(10) Limitations on "topless table dancing" applicable only to women.

These are simply the tip of the iceberg insofar as creative and innovative claims of "sex discrimination" that would likely be given serious legal consideration under the Equal Rights Amendment.

Athletic Competition—The idea of 'unisex' interscholastic and intercollegiate athletic competition, which up to now has been confined to feminist extremists, would suddenly be a matter of constitutional significance under the Equal Rights Amendment. If separate athletic competitions cannot take place among blacks and whites, it is difficult to understand how the ERA would permit them to take place among men and women. Whether or not a competition involved a contact or non-contact sport would also seem to be constitutionally irrelevant. Already, a Pennsylvania court, applying its own State ERA, has ordered the State to permit "girls to practice and compete with boys" in high school sports, including contact sports. The court has concluded,

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[149] 29 CFR Part 1604.11. On this subject generally, see Berns, Terms of Endearment, Harper's October 1980 at 14.

> the existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by particular characteristic.[150]

A Washington court has also held that it is sex discrimination under that State's ERA to deny girls the right to play on a high school football team.[151]

The former Department of Health, Education, and Welfare (HEW) was notorious in its efforts to promulgate rules and regulations establishing absolute athletic equality between men and women in colleges and universities receiving direct or indirect Federal assistance.[152] Under the ERA, such policies would become the supreme law of the land.

AMA and Sports

The following comments are those of a committee of the American Medical Association on feminist calls for "equality of opportunity" in athletic competition:

"It is in the long range interest of both male and female athletes that they have their own programs . . . following puberty, most boys uniformly surpass girls in all athletic performance characteristics, except flexibility . . . if girls demand equal rights to compete on boys' teams, boys are likely to request the same rights in return . . . Boys will win a majority of the positions on girls' teams which would result in virtual elimination of girls' programs." (AMA Committee on the Medical Aspects of Sports, June 1974).

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[150] *Packel v. Pennsylvania Interscholastic Athletic Association*, 18. Pa. Comm. Ct. 45, 334 A.2d 839, 843 (1975); Professor Freund has said on a related matter, "To hold separate Olympics competitions for whites and blacks would be deeply repugnant to our sensibilities. However, should we feel the same repugnance, the same kind of degradation at separate competitions for men and women?", Freund, The Equal Rights Amendment Is Not The Way, 6 Harv. Civil Rights Civil Liberties L. Rev. 234, 240 (1971). See also California Commission at 127; Skilton, Emergent Law of Women and Amateur Sports, 28 Wayne L.Rev. 1701, 1737, 1757 (1982).

[151] *Darrin v. Gould*, 540 P. 2d. 882 (Wash. 1975). It is not merely the participants in athletic competitions who would be subject to the requirements of the ERA. A State ERA provision has been interpreted in Washington to prohibit 'Ladies Night' promotions at such competitions, which periodically allow women to purchase tickets at half-price. *MacLean v. First Northwest Industries of America*, 600 P.2d 1027 (1978).

[152] 45 CFR Part 86. Nearly 40,000 words of regulations have been written by Federal agencies in providing meaning to the 36 words of Congress' legislation creating Title IX. Section 901(a) of the Education Amendments of 1972 (20 U.S.C. section 1081).

As with military standards,[153] athletic standards could also be called into question to the extent that such standards do not result in equal numbers of boys and girls (or men and women) qualifying for school athletic teams. As one leading supporter of the ERA has remarked, such standards,

> would have to be scrutinized to be sure that [they] were neither too high nor too low to allow both sexes equal opportunities in [athletic] competition.[154]

Indeed, one academic proponent of the ERA has even speculated that an alternative to "setting very high physical standards of participation in rough sports" under the Amendment might be to "change the rules of those sports."[155]

Housing Discrimination—Under current law, the Federal government and most States prohibit discrimination in the sale or rental of housing on the basis of race, color, religion, sex, or national origin. According to at least one leading authority on the Equal Rights Amendment, the ratification of the Amendment would probably require the extension of such "fair housing" laws to discrimination on the basis of "marital status".[156] The Federal government, under this interpretation of the ERA, would be required to initiate legal actions against landlords and other individuals who sought to implement any policy based on the marital status of individuals applying for an apartment or other form of housing.

Employment Leave—Another prominent commentary on the Equal Rights Amendment predicts that the Amendment, if adopted, would require that employers accord identical leave-time to males and females, including leave-time directly related to pregnancies. As the California Commission on the Effects of the Equal Rights Amendment observes,

> [Under the ERA,] male teachers should receive leave-time for child-rearing for the same length of time that female teachers may take such leave without risks to their jobs or unemployment benefits.[157]

This is designed to ensure that post-ERA society does not return to the old "stereotypes" with respect to the traditional maternal role in bringing up children.

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[153] See *supra* text at notes 48–52.

[154] Brown at 306. See also Brown and Freedman, Sex Averaging and the ERA, 1975 Woman's Law Rep. at 43; California Commission at 122–8.

[155] Babcock, Freedman, Norton, Ross, Sex Discrimination and the Law (Little, Brown 1974) at 1032.

[156] Brown at 42.

[157] California Commission at 147. Under the ERA, State employer insurance programs would probably be required by the Constitution to include pregnancy in the same manner as other disabilities, *cf. Geduldig v. Aiello*, 417 U.S. 484 (1974). See also *GE v. Gilbert*, 429 U.S. 125 (1976) relating to private employer disability programs. Public (and perhaps private) employment policies relating to mandatory leave at a designated stage of pregnancy, minimum leave periods for pregnancy, and unemployment compensation for pregnancy leave would also probably be altered sharply by the ERA.

Standardized Testing—Most colleges and universities employ some form of standardized testing to determine eligibility for admissions. Such testing also is common among employers for skilled job positions. According to some supporters of the Equal Rights Amendment, the Amendment would "impose strict scrutiny upon admissions tests which bear more heavily upon one sex."[158] This would seem to call into serious question such common examinations as the Scholastic Aptitude Test, the Law School Aptitude Test, the Graduate Record Examinations, and so forth which have repeatedly generated differential scores for men and women in various areas. Men, for example, have traditionally performed better than women in mathematics and spatial-types of testing, while women have performed better than men in testing relating to languages. The principle of scrutinizing tests which "bear more heavily upon one sex" also calls into question most physical examinations that could be utilized by employers.[159]

School Policy—There are a large number of areas relating to public education in which the ERA contains the potential to substitute the judgement of Federal judges for that of local school boards and administrators. Some of these are suggested by the statements of ERA proponents themselves in behalf of such policies as: (a) eliminating 'sexist' schoolbooks from public school courses;[160] (b) ensuring that boys and schools are not steered into "stereotyped" careers, e.g. boys into shop classes and girls into home economics courses;[161] (c) integrating sex education courses;[162] (d) prohibiting expulsion or other disciplinary policies relating to student pregnancies;[163] (e) ensuring that such disciplinary rules and regulations as those relating to hair length apply equally to boys and girls;[164] (f) establishing unisex athletic team policies;[165] and (g) ensuring that physical facilities, extracurricular facilities, curriculum opportunities, and enrollment requirements are absolutely identical for the sexes.[166] Under the ERA, there is likely to be substantially greater Federal involvement in local school affairs, all in the name of promoting "equal rights" for boys and girls. In the process, the degree of self-governance of local communities is likely to be diminished sharply.

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[158] Gallagher, The Effect of the Proposed ERA on Single-Sex Colleges, 18 St.L.U.L.J. 41,121. See also the discussion on the "New Discrimination" *infra* at 81.

[159] See *supra* text accompanying notes 48–52.

[160] California Commission at 1[illegible]3. See also Levin, Feminism and Thought Control, Commentary, June 1982 at 40.

[161] *Id.* at 131,153 ("Sweden has adopted a program which requires both boys and girls to study both home economics and shop in an attempt to avoid the sex-role pitfalls of the present generation.")

[162] *Id.* at 133 ("It is common practice today to separate young men and women in junior high and high schools for sex education classes. Such a practice will be unconstitutional after passage of the ERA.")

[163] *Id.* at 143 ("Expulsion of students from public schools [on account of pregnancy] would clearly violate the ERA.").

[164] *Id.* at 141–2 ("If the absolute approach advocated in the Yale article were applied to the ERA by the Supreme Court, hair length could not be regulated in only one sex [in the public schools.]")

[165] See *supra* text accompanying notes 150–2. The California Commission on the Effects of the ERA also calls into question the constitutional validity of a single-sex Little League under the ERA, particularly if its teams use public playgrounds. California Commission at 136.

Common Law Marriages—The California Commission on the Effects of the Equal Rights Amendment contends that State laws that prohibit so-called "common law" marriages would be in "violation of the Equal Rights Amendment" because they are "neutral on their face, but discriminatory in impact."[167]

State Licensing—State and local licensing practices may also be faced with substantial overhaul if the predictions of one leading exponent of the Equal Rights Amendment are borne out. Barbara Brown in her textbook on "Women's Rights and the Law" states that joint licensing of such professions as barbers and cosmeticians may be necessary in order to "overcome the social pattern which prompts men who would patronize beauticians to go to barbers instead thus benefitting the predominantly male profession of barbers".[168]

In summary, there are countless areas of the law that may be subject to major change upon passage of the Equal Rights Amendment. Most of these changes would be required, not because of existing laws or policies which discriminate against women (although there are a few of these), but because of laws and policies which ERA proponents believe to have a "discriminatory impact" upon women even though they are purely neutral in their treatment of the sexes. Such "discriminatory impact" analysis is likely to expand the boundaries of the Equal Rights Amendment far beyond most legitimate areas of discrimination about which the vast majority of American people are concerned.

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[166] See generally California Commission at 130–41,152.
[167] *Id.* at 167.
[168] Brown at 222.

The New "Discrimination"

A new definition of "discrimination" has evolved in recent years in the area of race.[1] Unlike the traditional understanding which seeks to understand the intent or purpose behind some allegedly discriminatory action, the new "discrimination" looks primarily to the statistical impact of an action upon the races. In other words, it is directed at "equality of results" rather than "equality of access". The concept of "discrimination" under the ERA is likely to be interpreted in the same manner, altering the current "intent" standard under the Equal Protection clause of the Fourteenth Amendment.[2] As the Civil Rights Commission has observed, "Even laws neutral on their face, but that affect one sex more harshly than the other, would have to be re-examined."[3] This is an extremely important point. Consider the impact of the ERA on such sex-neutral laws as the following if it employs the analysis of the new "discrimination":

(1) Veterans preference laws which provide advantages to veterans seeking public employment jobs;

(2) Reductions in eligibility or funding for AFDC and other welfare programs that tend to go to households headed by women;

(3) Laws aimed at prostitution or opposite-sex massages;

(4) Height and weight requirements for the military, or for police and firefighting positions.

There are an unlimited number of such laws that would be in violation of the Constitution if "discrimination" comes to mean in the area of sex what it already means in many areas of the law relating to race. Professor Emerson, in his Yale Law Journal article endorses the applicability of the "new discrimination" to the Equal Rights Amendment.[4]

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[1] See the discussion on what constitutes discrimination in such recent Supreme Court decisions as *Griggs u Duke Power,* 401 U.S. 424 (1971); *Washington u Davis,* 426 U.S. 229 (1976); *Arlington Heights u Metropolitan Authority,* 429 U.S. 252 (1977); *Personnel Administrator of Massachusetts u Feeney,* 442 U.S. 256 (1979); *Mobile u Bolden,* 446 U.S. 55 (1980); *Connecticut u Teal,* 50 U.S.L.W. 4716 (1982).See also the Voting Rights Act Amendments of 1982, Pub. Law 97–205, Section 3; Additional Views of Senator Hatch, Senate Report No. 97–417 (Voting Rights Act Extension) at 94–187.

[2] *Personnel Administrator of Massachusetts u Feeney,* 442 U.S. 256 (1979); *cf.* Brown at 17.

[3] Civil Rights Commission (1978) at 8.

[4] Yale Law Journal at 898, 971–2 See also Civil Rights Commission (1978) at 8; Brown at 228 ("neutral rules, such as tests and physical requirements that exclude a large percentage of women from certain job classifications are subject to strict scrutiny under the ERA because of their disparate impact . . ."). See *supra* notes 52–6. Governor Richard Lamm of Colorado, testifying in behalf of the ERA, has spoken approvingly of Federal judges who "have permitted the use of statistics to prove that, although an act is neutral on its face, it has a discriminatory impact." Testimony before Civil and Constitutional Rights Subcommittee of House Committee on Judiciary on the Equal Rights Amendment, July 13, 1983.

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POLLS, POLS, AND THE EQUAL RIGHTS AMENDMENT

The recent ratification history of the Equal Rights Amendment provides some interesting insights into the use of public opinion polls in media campaigns. The primary lesson to be learned is that polls are not the best indicators of public sentiment about important policy questions such as equal rights. Nevertheless, polls continue to be much used by those seeking to influence the vote of legislators on this (and other) issues.

For instance, the National Organization for Women (NOW) has issued a fact sheet entitled "Strong Public Support for ERA." NOW has published a pamphlet making the same point. The sheet and the pamphlet point to the public opinion polls which show that Americans support the Equal Rights Amendment by margins of two and three to one. In NOW's view, these polls demonstrate that Americans by and large want the proposed ERA, and that only the recalcitrance of legislators prevents it from being ratified.

Actually, polls and public opinion are more complicated than that. The poll data cited by NOW are interesting and useful, but so selectively presented and analyzed as to be misleading. There are other indicators of public opinion more reliable, other polling questions which are more probing, and other facts which NOW too easily ignores.

New York and New Jersey, 1975

At the November 1975 elections, voters in New York State and New Jersey voted on proposed equal rights amendments to their own State constitutions. Both State amendments were substantially identical to the proposed national Equal Rights Amendment.

Proponents of the State amendments had their polls, and they used them the way proponents of the ERA are now using polls. For example, on November 1, 1975 the New York Times reported that "two independent polling organizations say that a majority of those who plan to vote on the amendment question would approve it."[1]

This is the first in a series of occasional papers on matters of general public interest. It should not be construed as necessarily reflecting the views of United Families Foundation, nor as an attempt to aid or hinder the passage of any measure before the U.S. Congress or any State legislature.

The voters, perhaps not aware of how they "would" vote, rejected the amendments in both states.

The vote could not be explained in terms of general negativism of voters. As the Times explained the next day:

> In recent days the amendment's supporters had expressed the fear that the amendment would become the victim of general voter negativism, since it was coupled on the ballots of both states with bond issues and other propositions.
>
> But the victory of the first six Charter-revision proposals in New York City appeared to indicate that the voters did indeed select the targets of their displeasure, rather than cast indiscriminate "no" votes.[2]

The amendment's proponents blamed their defeat on irresponsible extremists and scare tactics. Betty Friedan, presumably reflecting the moderate attitude of the proponents, said the proposals were defeated because of "lies" and "enemies."[3]

When the final vote counts were in, the New York amendment had failed by nearly 500,000 votes and the New Jersey amendment by more than 30,000 votes.[4] The voters had made the point that we are not governed by public opinion polls.

Florida, 1978

A similar event took place in Florida in 1978. Florida voters were asked if they wished to add an equal rights amendment to their State constitution. The answer was a resounding "no." Of course, as the Miami Herald reported, "pre-election polls showed the 'Little ERA' winning by 2-1...."[5] In fact, the Florida proposal failed by 340,000 votes.[6]

The failure of the voters to be guided by the polls must surely be disconcerting to the advocates of the Equal Rights Amendment. It is amazing that voters preserve such independence of voting behavior in the face of such unanimous polls.

Nevada, 1978

It appears that many advocates of the Equal Rights Amendments would rather rely on polls than people. The events surrounding an ERA referendum in Nevada in 1978 provide a case in point.

The Nevada legislature authorized a non-binding referendum on the ERA. The people of the State were to be asked whether they favored ratification of the ERA by the State legislature or not. The referendum outcome would not be binding on the legislature. It was merely advisory.

Recognizing that the ERA was liable to do better in polls than at the polling place, ERA advocates sued to have the referendum stopped. The Nevada district and supreme courts, and the Supreme Court of the United States, all refused to halt the vote. There was found to be no bar in the Constitution to the people informing their legislators, by referendum, of their views.[7]

Although there are no published polls preceeding the Nevada vote, there is this anecdotal evidence of the ERA's chances from the Las Vegas Sun:

> Vic Fingerhut, the "media representative" for the League of Women Voters--which had spent $300,000-$4[illegible]0,000 in Florida and $70,000 in Nevada on a media campaign--said the Nevada ratification referendum is a "toss-up."[8]

Nevada voters, however, having defended their right to advise their legislators of their views, disregarded the League's media campaign, and advised against the Equal Rights Amendment by a vote of more than two to one.[9]

Iowa, 1980

As recently as Iowa's 1980 election polls on the ERA were being touted as definitive. In the election of that year, Iowa voters were asked if they wished to add an equal rights amendment to the State constitution.

> Peg Anderson, chairwoman of the Iowa Equal Rights Coalition said on Sunday that a straw poll conducted at the Iowa State Fair shows overwhelming support for the proposed amendment to the state constitution.
>
> The poll taken August 14-24 at the fair shows 2,905 votes in favor of the amendment and 832 opposed, Anderson said.[10]

Straw polls are, of course, unreliable. But the Iowa Poll, conducted by the Des Moines Register, has an impeccable reputation. Shortly before the ERA referendum, the Iowa Poll showed that the ERA measure would get 5[illegible]% of the vote.[11]

Perhaps we can conclude that supporters of an equal rights amendment attend State fairs more often than they do polling booths. What we cannot conclude is that polls on the subject of the Equal Rights Amendment accurately predict votes. The Iowa proposal was defeated 56% to 44%.[12] "The ERA Coalition spend about $160,000 in support of the amendment, compared to about $56,000 by its opponents."[13]

The Wrong Questions?

Public opinion polls are one indicator of public sentiment, but they have their weaknesses, as professional pollsters know. They are often wrong, as the examples provided above show. One of the reasons they are wrong on the issue of equal rights for men and women is that they ask the wrong questions. When voters ask themselves the right questions, as they go into the voting booth, the get decidedly different answers than do pollsters with their take-it-or-leave-it questions. This weakness of the take-it-or-leave-it variety is shown in the poll below, which was done by the respected public opinion polling firm Decision Making Information in 1977.

1. If the Equal Rights Amendment means that women would be eligible for draft and combat duty just like men, would you favor or oppose the ERA? F:35% O:61%

2. If the Equal Rights Amendment means that final power over marriage, divorce, and child custody would be transferred to the federal government, would you favor or oppose the ERA? F:2. % O:65%

3. If the Equal Rights Amendment means all activities of schools and colleges would have to be co-educational, would you favor or oppose the ERA? F:44% O:51%

4. If the Equal Rights Amendment means that homosexuals would be able to get marriage licenses would you favor or oppose the ERA? F:28% O:66%

Similar results were obtained by polls conducted in four unratified States in 1982 by United Families Foundation. Coupling support for the ERA to potential policy outcomes produced the following results:[14]

	State	Support ERA	Oppose ERA
1. If ERA means women drafted:	Georgia	31%	63.2%
	Florida	33.9%	59.7%
	Missouri	29.3%	64.6%
	Virginia	34.4%	58.8%

2. If ERA means women in combat	Georgia	23.4%	72.7%
	Florida	20.5%	75%
	Missouri	21.4%	72.6%
	Virginia	29.3%	66.5%
3. If ERA means federal control over marriage law	Georgia	28%	61.3%
	Florida	26.4%	51.3%
	Missouri	24.6%	60.6%
	Virginia	31.3%	50.2%
4. If ERA removes protection from strenuous jobs	Georgia	30.5%	63.2%
	Florida	29.2%	52.9%
	Missouri	28.8%	57.4%
	Virginia	36.9%	52.9%

It is not, of course, absolutely certain that the Equal Rights Amendment would bring about the policy outcomes mentioned in the DMI and UFF polls. It is certainly conceivable that it would. Indeed, supporters of the ERA either admit or claim that it would do so, depending on their own attitudes.

The Intensity Factor

Another problem with public opinion polls and the Equal Rights Amendment is that ERA generates intense feelings, feelings which are not easily measured by the kind of favor/oppose questions usually asked by pollsters and ERA advocates.

One measure of the intensity does emerge from the UFF poll in Virginia where the favor/oppose question was coupled with other questions designed to measure how necessary Virginians thought the ERA was. On the straight favor/oppose question, Virginians split evenly, with 45% favoring it and 42.2% opposed, a result that falls within the margin of error.

However, when asked if it is necessary to amend the Constitution to achieve equal rights for women, only 35.2% of Virginians thought it was, as against 53.7% who did not. In other words, 10% of the respondents favored the ERA in the abstract, but did not feel it was necessary. The opponents of ERA apparently put more conviction into their opinions.

Conclusions

The DMI and UFF polls present respondents with the kinds of questions that face legislators. When people are forced (by these poll questions) to think as legislators, they do not favor the Equal Rights Amendment because they do not favor its potential effects. This is far different, of course, from opposing the ERA's general statement of philosophy, which almost no one does.

It may well be that public opinion polls on the ERA have been at such variance from referendum result (and from results in State legislatures) because they have focussed on general attitudes, and not on the specific issues which occur to voters (and legislators) when they cast their votes.

FOOTNOTES

1. "Last-Minute Rhetoric is Confusing Many on Equal Rights Amendment," New York Times, 11/1/75, p. 61.

2. "Equal Rights Amendments Lose In New York and Jersey Voting: 6 City Charter Changes Backed," New York Times, 11/5/75, p. 1.

3. Ibid.

4. New York Times, 12/9/75, p. 87.
New York Times, 12/16/75, p. 47.

5. "Little ERA, 7 More Revisions Rejected," Miami Herald, 11/8/78, p. 21A.

6. Miami Herald, 11/9/78, p. 25A.

7. Kimble v. Swackhamer, 439 U.S. 1385 (1978), Justice Renquist acting as Circuit Justice.

8. "ERA Proponents Push in Nevada, Florida," Las Vegas Sun, 11/6/78, p. 42.

9. "Tallies Counted on 6 Questions," Las Vegas Sun, 11/9/78, p. 3.

10. Des Moines Register, 8/26/80, p. 3B.

11. Des Moines Register, 11/5/80, p. 1A.

12. Ibid.

13. Ibid, 17A.

14. These polls were conducted the first week in January 1982 by professional sampling organizations in the respective States. In each case a scientific, stratified sample of 400 was drawn from among telephone users on a random basis. The margin of error was ± 5%. Complete poll results are available from UFF, including the exact wording of questions, which have been simplified somewhat for this presentation.

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